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ABSTRACT

This document presents a briefing by Representative Claude Pepper on the abuses in guardianship of the elderly and infirm, and testimony from witnesses at the Congressional hearing called to examine the issue of guardianship abuse. The opening statement of Representative Pepper and a prepared statement of Representative Helen Delich Bentley are included. Two panels of witnesses provide testimony. The first panel illustrates the problem of abuses in guardianship and includes testimony from: (1) 81-year-old Minnie Monoff of Greeley, Kansas; (2) 66-year-old Marguerite Van Etten of Plantation, Florida; (3) 83-year-old Tod Porterfield of Albion, Indiana; (4) Etan Merrick, wife of 71-year-old David Merrick, Broadway producer; (5) John Hartman, a former public guardian and currently an inmate at Community Treatment Center in Detroit, Michigan; and (6) Jim Godes, an investigator for the Subcommittee on Health and Long-Term Care. The second panel focuses on the scope of the problem and needed reform, and includes testimony from William Ahearn, managing editor, Associated Press, New York, New York; John Pickering, chairman of the Commission on Legal Problems of the Elderly, on behalf of the American Bar Association; Nancy Trease of Legal Aid Service, Broward County, Florida; and John Regan, professor of law, Hofstra University School of Law, Hempstead, New York. Questions and answers, and relevant materials submitted for the record are appended. (NB)

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[COMMITTEE PRINT]

ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE

A BRIEFING

BY

THE CHAIRMAN

OF THE

SUBCOMMITTEE ON HEALTH AND LONG-TERM CARE

OF THE

SELECT COMMITTEE ON AGING
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

FIRST SESSION

U.S. DEPARTMENT OF EDUCATION
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SEPTEMBER 25, 1987

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ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE

FRIDAY, SEPTEMBER 25, 1987

HOUSE OF REPRESENTATIVES,
SELECT COMMITTEE ON AGING,
SUBCOMMITTEE ON HEALTH AND LONG-TERM CARE,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2359-A, Rayburn House Office Building, Hon. Claude Pepper (chairman of the subcommittee) presiding.

Members present: Representative Pepper.

Staff present: Kathleen Gardner Cravedi, staff director; Melanie Modlin, assistant staff director; Peter Reinecke, research director; Judy Whang, executive assistant; and Mark Benedict, minority staff director.

OPENING STATEMENT OF CHAIRMAN CLAUDE PEPPER

Mr. PEPPER. The committee will come to order, please.

I am sorry to be a little late. I am very grateful to all of you, especially this fine panel here and the other witnesses to come later, for your being here.

This hearing illustrates how diligent we must be to protect the rights of the people of this country against abuse. We are going to hear from our great news collecting organization, the Associated Press, the results of a magnificent study they made about this critical subject of guardianship. I warmly commend them upon the initiative they have shown in investigating such a critical matter. It deals with the right of people not to have their liberty and their property taken away from them, it seems to me, without due process of law, or without being assured the need for protection of the law as the Constitution affords our people.

Just to show you how critical this situation is, only 14 States require the allegedly incompetent elderly person to be informed as to their legal rights. I am talking about the appointment of guardians in the State court, generally the county judge's court, most of which are overburdened with work. I am talking about people in many cases not even present at their own hearings or not represented by counsel at the hearing. I'm talking about people having their liberty and their rights of property taken away from them by a summary proceeding.

Now, you know, to have a guardian appointed means that the courts have given to another person almost complete control over your own person—that is, they can generally determine whether to

put you in an institution or let you live in your home, or take your home away from you, or make you live in another kind of place; they determine what happens to your property, and then can take your property away from you. That is the power of a guardian. Under guardianship another person exercises almost complete control over the person declared incompetent, the ward.

The elderly are generally the victims of these abuses because many of them are sick and frail and they somehow lend themselves to this abuse. As I mentioned, only 14 States require allegedly incompetent elderly persons to be informed as to their legal rights. Now, under the Constitution of the United States, even a defendant in a cruel murder case is entitled to be informed of his constitutional rights.

Eight States have no requirement that the "accused"—that is the person that they seek to have a guardian appointed for—even be notified that someone is petitioning to become that individual's guardian. Now, no criminal could be sentenced in a court without being notified to be there and having an opportunity to hear what the judge said.

Fifteen States do not even specify that the elderly person has a right to counsel. It is an accepted fact of American constitutional law that an individual has a right to counsel—that is due process. But not the person who is about to be charged with being incompetent by somebody else. And in a lot of States, they don't even prohibit a convicted felon from becoming the guardian of an individual.

Only 16 States require that the elderly person even be present at his or her own guardianship proceedings.

Thirty-three States allow "advanced age" as a grounds for appointing a guardian. I wonder if they would get me, I am 87. I will have to be on the alert that somebody doesn't go in, in my absence and without my knowledge, and without my having an attorney, and ask to have a guardian appointed for me. He is an old man, they might say, 87 years old. He ought to have a guardian. Maybe I should, but I don't want one. Thirty-three States allow "advanced age" as a cause to establish a guardianship.

Only 12 States require that medical evidence be submitted to show incompetence, irresponsibility, inadequacy, or loss of one's mental powers. In a lot of States where they do ask for certain kinds of medical evidence, the certificate from the physician is not even required to show where the individual lives, what his telephone number is, and that the doctor really knows who the individual is, that it is assuredly the individual that he is talking about. So these are very critical matters.

We invited the Department of Justice to be here today because we thought anything pertaining to the rights of the people of the country was a matter of concern to the Department of Justice. They told us they didn't have any contribution to make on this subject. I am sorry that they didn't feel that it was a subject within their jurisdiction—I wish they had. The Associated Press and all of you have shown that it is a matter of grave public concern.

So we are examining this matter primarily as it affects the elderly because they are generally the victims. But a lot of abuses have occurred when avaricious people who have an elderly person, or for

that matter, persons who becomes ill for a while in their charge. There are three illustrations as to how this abuse occurs.

In Arizona, for example, the authorities filed suit seeking to force a daughter to move her mother from a State mental hospital to a private home or to some other care site. The daughter vigorously resisted the effort—she would rather have kept her mother in a State mental institution where the State was paying the bill than to take the responsibility for her mother's care in an institution where she would have to meet the expense.

There was another case in Kansas. It was not until a 78-year-old chicken farmer returned home following her stroke that she learned that a guardian had been appointed for her by the court to care for her during her recovery. But before she could dissolve the guardianship, the guardian managed to have her removed from her home and institutionalized even though she was mentally and physically able to care for herself. And that was somebody who wanted his or her hands on that lady's property. This woman had a guardian appointed for her in her absence, of course, and without an attorney being present at the hearing. And when it was time for her to leave the hospital, she found herself without a home.

Then one other case occurred in Florida when a woman left comatose for two months following a car accident did not discover that she had had a guardian appointed to care for her until months after she had recovered. She went to vote and they told her she couldn't vote. She said, why can't I vote? I am a citizen. I am within the eligible age. Oh, the man at the Records Office said, you have had a guardian appointed.

A guardian? I haven't got any guardian. Well, she found out she had, that somebody had taken advantage of the fact that she was comatose and had gone into a court and made a presentation to the judge.

Now, we are not charging corruption on the part of the judges but we are charging that they allow too loose a practice. And we are talking about giving the same protection that a criminal is entitled to in court to the people who are made the subject of an application to get a guardian appointed: the right to a lawyer, the right to be present at legal proceedings, the right of competent evidence. That is a very serious matter, to put you in the institution against your will. They have the right to do that, a guardian does. A guardian has the right to go into court and say, my ward is not capable of looking after herself, I want you to put her in an institution. If the guardian says that, the court is likely to go along with it.

So we are talking about a matter we do think is of Federal concern. The American Bar Association has shown a keen interest in this matter, and I am hoping the Department of Justice will change its attitude. After they find out about our hearing and reading the articles from the Associated Press. I hope they will realize that it is a matter of concern to the government of this country, and to the courts of this country, and to the justice system of our Nation. And at least we would like to have their cooperation as we try to promulgate a uniform system of laws that will protect people against such abuses; or else, as I think it has the power to do, Congress itself can propose legislation assuring minimum rights under

the equal rights provision of the Constitution, and the due process laws of the Constitution.

So now we have a distinguished group of witnesses today, whom we are very pleased to have, and I am very grateful to all of you for being here.

Our panel consists of Ms. Minnie Monoff, age 81, from Greeley, Kansas; Ms. Marguerite Van Etten, age 66, from Plantation, Florida; Mr. Tod Porterfield, age 83, from Albion, Indiana; Ms. Etan Merrick, wife of Mr. David Merrick, 71, a Broadway producer, and distinguished American, of New York; Mr. John Hartman, former public guardian, currently an inmate at Community Treatment Center in Detroit; and Mr. Jim Godes, investigator, Subcommittee on Health and Long-Term Care.

[The prepared statement of Chairman Pepper follows:]

PREPARED STATEMENT OF CHAIRMAN CLAUDE PEPPER

Members of the subcommittee. Distinguished guests. The subject of today's hearing makes for unpleasant listening. It will shock you, as it did me, to learn just how frequently abuse can occur following the establishment of a guardianship. There is a powerful and unique abrogation of rights when a person's care is entrusted to another under a guardianship arrangement. The typical ward has fewer rights than the typical convicted felon—they can no longer receive money or pay their bills. They cannot marry or divorce. By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty.

You would think, given the severity of restriction guardianship imposes upon one's civil rights, that great care would be taken by the States and the Federal Government to safeguard against abuse and exploitation. Sadly, the findings of over ten years of research by this subcommittee reveal that guardianship—the legal mechanism for providing incompetent elderly and infirm with needed financial and personal assistance—fails miserably in accomplishing that objective.

The subcommittee found that less than one half of the 500,000 million individuals under guardianship on any given day in America had the benefit of representation by an attorney during their guardianship proceeding. An equal number are not even present when a guardian is appointed. Even a convicted felon is accorded such due process rights.

The fact that in most States neither an attorney nor the individual whose competency has been called into question need be present for a guardianship to be successfully processed is problematic enough. The process, we found, is further exacerbated by the ease with which a guardianship can be secured and the relative difficulty involved in dissolving it.

To test the facility with which a guardianship could be granted, a subcommittee investigator sought to obtain guardianship over his "fictitious" aunt. In one instance, he was told that if he hand-walked the "papers" through court he could probably conclude the process and "get on with his life" in two hours. The "papers" consisted of two medical verifications of the proposed ward's incompetency. However, the forms did not require an address, phone number or ID from the physician. Another form waived one's right to an attorney. Obviously, an unscrupulous guardian can easily obtain a signature waiving an attorney from an individual whose physical or mental ability has been temporarily or permanently compromised. Remaining papers simply asked for pertinent personal information and background regarding the applicant for guardianship.

Given the relative ease with which a guardianship could be secured, it is not surprising to learn the relative frequency with which abuse can occur. Some of the more heartbreaking examples of abuse involve elderly who were living independently until an injury or illness necessitates a stay in a hospital or nursing home. Upon discharge from the hospital or nursing home, many older Americans learn to their chagrin that their families or those entrusted by the court with their care have literally sold their homes out from under them. Equally heartbreaking are cases where families or caregivers have their loved ones or "wards" committed to a public

institution as a means of obtaining their property. The following examples are illustrative of abuses of this nature:

In Arizona, authorities filed suit seeking to force a daughter to move her mother from a State mental hospital to a private rest home. Officials charged that the woman would rather keep the mother in a free public hospital than deplete her inheritance.

In Kansas, it was not until a 78-year-old chicken farmer returned home following her stroke that she learned that a guardian had been appointed by the court to care for her during her recovery. Before she could dissolve the guardianship, the guardian managed to have her removed from her home and institutionalized even through she was mentally and physically able to care for herself. It took five weeks for the guardianship to be dissolved, but years to resolve the guardian's financial mismanagement. The deed to the farmer's home has yet to be returned.

In Florida, an elderly woman left comatose for two months following a car accident did not discover that she had a guardian appointed to care for her until months after she had recovered. Exercising her right to vote, she was advised she could not because she had been declared "mentally incompetent." It was only then that she began to understand why certain assets were missing.

The subcommittee found that the States do not have uniform standards and regulations to safeguard against the abuses we uncovered. For example, few regulatory checks are in place, such as a requirement for verification of mental or physical illness. We found that only 12 States require any verification by a medical doctor that an individual is incompetent. The Associated Press found in their year-long study of this issue that of the 2,200 cases they reviewed nationwide about one-third of them were granted without the benefit of a doctor's verification of medical necessity.

The subcommittee also found that there is a marked lack of due process in most States in the procedure by which a guardian is appointed. As mentioned earlier, in most cases the proposed "ward" is not required to be present, nor is his or her attorney. We found that only 16 States require that the elderly person be present when the guardianship hearing takes place, and 15 States do not even specify that the elderly person has a right to counsel at the hearing. The subcommittee was also surprised to learn that there is no minimum requirement of education, experience or intelligence required in any of the fifty States to be a guardian. In Michigan, a janitor in a bar, making $14,000 annually, answered a newspaper ad describing a position as a guardian with a local court. As he will tell us today, the decision between managing his $14,000 a year salary or over $1 million of assets was easy. He answered the ad and was hired. That was the beginning of his eight-year career as a court-appointed guardian that ended when it was dscovered that he had been using the assets of his 400 "wards" for personal purposes. We found that in only 5 States are convicted felons prohibited from being appointed guardians.

Probate courts are responsible for granting guardianships. They are terribly overburdened. It was found that in instances where guardianships are carefully and appropriately established, follow-up checks to monitor the progress of the guardianship is infrequent. Only half the States require that guardians file an annual report of their wards' well-being. Six States do not require any financial accounting of wards' monies.

Interestingly, the United States is one of the few developed countries in the world that does not yet have in place a national system of guardianship. Unlike the United States, where guardianship laws differ not only from State to State, but from county to county, judge to judge and guardian to guardian, Britain, Japan, France, Canada and even the Soviet Union, to name a few, have national guardianship standards in place.

We asked the Justice Department to be here today. We thought that the protection of civil rights was well within their jurisdiction. We were advised that the department would not have anything to contribute to this hearing as it views this problem as one which should be handled by the States. Once again our administration has chosen to ignore yet another opportunity to protect the basic civil liberties of our citizenry, especially our elderly and infirm.

The American Bar Association, and other legal experts expected to testify today will suggest that necessary reform will require the adoption and enforcement of uniform standards to be applied consistently throughout the United States. The Federal Government should not continue to sit idly by, but rather, should take whatever steps necessary to ensure that the States will not abridge the rights of those least able to protect themselves.

We look forward to hearing the testimony of our first panel of witnesses. The bad news is that they are here to detail their unfortunate experiences under guardianship. The good news is that they are the success stories. They, unlike many others

in abusive guardianships, were able to successfully prove their competency and restore their rights. Your stories will be helpful to us as we seek to bring about needed reform.

Mr. PEPPER. At this time I would like to submit the prepared statement of our colleague Congresswoman Bentley for the hearing record. Hearing no objections her statement will appear at this point in the hearing record.

[The prepared statement of Representative Helen Delich Bentley follows:]

PREPARED STATEMENT OF REPRESENTATIVE HELEN DELICH BENTLEY

It is a pleasure to be here with you today to investigate alleged abuse in the national guardianship system for the disabled, infirm and incompetent elderly.

Recently, I have been receiving large quantities of mail regarding abuse of the elderly both physically and financially. It is a scary thought, and inconceivable to many of us, to be disabled or infirm, and therefore, be virtually helpless.

This is not an experience that many of us have ever encountered, nor do we ever wish to. The topic of this hearing is important. We must find ways to stop abuse, whether it is abuse of children or adults. With the reports of mercy killings in the Lutheran Nursing Home in Montgomery County to reports that an elderly man's caretaker bound and gagged both him and his sister and left them for dead in the basement, makes one acutely aware of the abuse that is affecting elderly individuals.

The circumstances which may force an individual into a guardianship scenario are numerous. Statutes at the state level are unclear and ambiguous. Many of the elderly who are placed under guardianship are not completely mentally or physically incapacitated. However, as the statutes now stand, they may lose control over their financial assets which is almost as devastating as any debilitating illness.

We need to examine both the guardianship laws and the extent of the abuse occuring within the elderly population. Abuse is a crime, and it is also a crying shame.

Mr. PEPPER. First we will hear Ms. Minnie Monoff. Ms. Monoff, we will be pleased to hear you.

PANEL ONE—THE PROBLEM: ABUSES IN GUARDIANSHIP: CONSISTING OF MINNIE MONOFF, AGE 81, GREELEY, KA; MARGUERITE VAN ETTEN, AGE 66, PLANTATION, FL; TOD PORTERFIELD, AGE 83, ALBION, IN; ETAN MERRICK, WIFE OF DAVID MERRICK, AGE 71, BROADWAY PRODUCER, NEW YORK, NY; JOHN HARTMAN, FORMER PUBLIC GUARDIAN, CURRENTLY AN INMATE AT COMMUNITY TREATMENT CENTER, DETROIT, MI; AND JIM GODES, INVESTIGATOR, SUBCOMMITTEE ON HEALTH AND LONG-TERM CARE

STATEMENT OF MINNIE MONOFF

Ms. MONOFF. Mr. Chairman, members of the committee:

My name is Minnie Monoff. I am 81 years old and I live in Greeley, Kansas. I am pleased to have the opportunity to be here today and to discuss with you the sad experience that I had several years ago when I was made a ward of the State.

In February of 1984, I suffered a stroke. When I recovered and returned home, I learned that a guardian had been appointed by the court to manage and care for myself and my property. I was pretty disturbed to discover that no effort was made, prior to the appointment of the guardian, to determine whether my family could serve in this capacity.

Once home, I wanted to get control once again of my life. I wanted to continue raising my chickens, receive my meals-on-wheels, and see my many friends and neighbors. I called my guardian and advised her that I was now able to take care of myself and would no longer need her assistance.

In spite of my conversation with her, several weeks later she came to my house and said, "Minnie, I'm taking you to a nursing home." I reminded her that I was perfectly able to care for myself and had no intention of going to a nursing home. Three weeks later, she returned and was accompanied by the administrator of the nursing home. They said they were there to take me to a nursing home. Well, I almost passed out. I told them to leave, that I was able to take care of myself.

Later that same day, the sheriff, the nursing home administrator and a nurse returned to my house. I had just finished mowing my lawn and feeding my chickens. When I unlocked the screen door, the sheriff thrust a paper in my face and stated that it was a court order to remove me from my home and place me in a nursing home. I was shocked. I told the sheriff, "What do you all mean? I'm doing my work. I am enjoying my life here. Why do I have to go?" He said that he was simply following orders and that if I didn't comply they would forcibly carry me out of the house. I asked if I could leave on Monday, which would give me the weekend to get my home in order. He said no, I had to go right then in my work clothes. Can you imagine being forcibly removed from your own home? The sheriff looked at me when were leaving and said, "This is the worst thing I have had to do in my career—to take someone from their home."

I was removed from my home simply because my guardian felt I should be in a nursing home. She never asked if I felt I would need nursing home placement. In fact, I never spoke to her except on the occasion I previously mentioned. Furthermore, I was never advised that a hearing involving my competency was scheduled. I was not present at the hearing nor was an attorney of my choosing. I later learned, while in the nursing home, that an attorney was appointed in my absence and he agreed to my guardian's petition.

You don't know how terrified I was. I had to leave my home where I was happy and taking care of myself. I felt like a criminal. That's the way they treated me. That's the way I felt.

I spent the next 5 weeks in the nursing home. During that time, I managed to contact the State Agency on Aging and in turn the State Ombudsman, who is responsible for investigating abuses involving the institutionalized. Five weeks of pleading eventually overturned my guardianship and I was able to go home. What began as a plan to protect myself and my affairs while I recovered from my stroke ended up a nightmare.

Seldom in my life have I ventured far from my house. In fact, this is the first time I have been to Washington, D.C. or flown in an airplane. The only reason I am here is to help others to avoid my sad experience. I hope that by being here today I have done just that.

Thank you.

Mr. PEPPER. If the American people could all hear that, Ms. Monoff, they would almost certainly want to rise up against such abuses as you have been the victim of. You impress me as being a very competent person.

Did you enjoy your airplane ride?

Ms. MONOFF. I enjoyed it very much, and I enjoyed all the people around me.

Mr. PEPPER. Very good. You are going back home by plane?

Ms. MONOFF. Back home this evening.

Mr. PEPPER. Ms. Monoff, you are 81. You are not quite old enough to remember it. I have on my office wall here a photograph of the first airplane flight in history.

Ms. MONOFF. Is that right?

Mr. PEPPER. By Mr. Orville Wright of Dayton, Ohio.

I got a bill through in 1939 for Mr. Wright making National Aviation Day on his birthday—August the 19th—and he came and gave me a photograph of that first flight, at Kitty Hawk. And in the lower left-hand corner it is inscribed, "To Senator Claude Pepper—Orville Wright." So I am old enough to have a picture of the first flight.

Ms. MONOFF. That's wonderful.

Mr. PEPPER. I am glad you enjoyed yours.

Ms. MONOFF. I sure did enjoy mine.

Mr. PEPPER. Next is Ms. Marguerite Van Etten of Plantation, Florida. I am glad to have a fellow Floridian here, Ms. Van Etten. You go right ahead.

Excuse me. You are lucky, Ms. Monoff, that your guardian didn't sell your home while you were in the nursing home.

Ms. MONOFF. That is what I am really proud of.

Mr. PEPPER. Go ahead, Ms. Van Etten. Thank you.

STATEMENT OF MARGUERITE VAN ETTEN

Ms. VAN ETTEN. Good morning, Mr. Chairman, members of the subcommittee. My name is Marguerite Van Etten, I am 66 years old. I am here to tell you about my experience with guardianship, which cost me dearly emotionally, professionally and financially.

On June 8, 1983, I was driving to an assignment in my job as a public health nutrition consultant for the State of Florida. A near-fatal traffic accident left my pelvis fractured, and I suffered head trauma and many other injuries. A week after the accident I went into a coma. Because of the severity of my injuries, it took two months to recover my full mental faculties. It took much, much longer, however, to recover the rights I had lost.

I have three daughters, one of whom petitioned the county court to find me incompetent and in need of a guardian. I was served with a notice of her petition at the hospital on June the 29th. I am not real sure that date is correct—it is according to the medical record, but according to the records I have, it was later than that. Anyway, it was about 3 weeks after the accident—as you might imagine, I wasn't very clear-headed at that point and I did not answer when they asked whether I'd attend the guardianship hearing.

On July the 5th, according to a court form, I indicated I "did not want to attend my hearing." But I recall, and my doctor's notes clearly indicated, that I was unable to answer any questions.

The hearing date came and my court-appointed lawyer waived the rights to a hearing. I was declared incompetent and my daughter was appointed as guardian. It was all very matter-of-fact and I had no say in any of it.

I was never told about the guardianship arrangement, but I knew something was wrong. Friends of mine told me that creditors were after me, and that the bank was foreclosing on my house. Neither of these things was true—my daughter had just spread the rumors to scare me. Telling me it was in my best interest, my daughter moved me to her home in Maryland. I really wanted to live in my own home in Florida, but it appeared I had no choice. When I asked my daughter questions, all I'd get were evasive answers and shrugs.

Against my daughter's protests, I moved back to Broward County in February 1984. When I got there, it was like a bad dream. My furniture was gone—my daughter had had it shipped to Maryland even before I was declared incompetent. I had to sleep on a sleeping bag on the bare floor, which wasn't easy with the injuries I had suffered in the accident. I lost my job. My driver's license had been revoked. I had trouble drawing on my bank account in my own name.

But there was more humiliation to come. In the spring of 1984, I, went to the polls, as I always do, to cast my ballot in Broward County elections. I am very active in the Daughters of the American Revolution and I consider voting an important constitutional right. I was flabbergasted to learn that I no longer had the right to vote. I called county officials—there had to be some mistake—and they told me they knew me as "83-0449; Van Etten, mentally incompetent." In fact, they told me the exact date—July the 29th,

1983. The hearing was set on July the 25th. So there is something wrong there.

Not being able to vote was the last straw. I decided to do everything possible to learn about guardianship and the existing laws. I had had to take a law course when I worked on my master's degree so I had a little background. I went around town by bus, with only one good eye, visiting courts, libraries, and becoming a knowledgeable individual. I learned that common criminals have more rights than a person under guardianship.

I knew I had to convince the courts of my competency if I were to terminate the guardianship, so I made an appointment with a psychiatrist who examined me and found me in good mental health.

Next I went to my guardian's attorney, whose father had handled all my legal affairs, and demanded he get me my rights back. Finally, on April 3, 1984, almost a year after my accident and about $40,000 later, I was restored to competency.

I consider myself very lucky. I was able to regain competency, but I don't want what happened to me to ever happen to anyone else. All you have to do is have a stroke or be in a coma and they can take away all your rights, your property, everything. Unless there is someone to monitor the situation, this could happen to anybody.

I am pleased the Aging Committee is holding this session. I hope that you will take strong and swift action to remedy this problem—abuse under guardianship. No one knows that guardianship means that you are declared mentally and physically incompetent. Professionals don't even know that. And the underlying thing is that you are declared incompetent before you get a court order of guardianship.

Thank you, and I would be happy to answer any questions that you might have.

Mr. PEPPER. Ms. Van Etten, I am sorry to hear this episode of your daughter treating you in that cruel way.

This committee has had a lot to do with the problem of abuse to elderly people. A lot of times it's physical abuse, not just the mental and financial abuse as you have recited. And you would be surprised to know how many of those abuses are committed by the sons and daughters of elderly people.

Ms. VAN ETTEN. That's right.

Mr. PEPPER. Your daughter, it would seem to me, if you were incompetent, in a comatose state, should have volunteered to take care of you and look after your affairs until you got all right again. Or if you went for a longer time, maybe a year or something, and the doctors all said you had no hope of ever recovering and the like, then a competent guardian might have been appointed. But to have been taken advantage of this way and to have given up $40,000 of your property during the time that you were under this status—that's a tragedy.

Ms. VAN ETTEN. I will say that figure includes the cost of three attorneys, and the cost of and the damage to my furniture and my belongings.

Mr. PEPPER. It is a shocking example. But you were able to right the wrongs and regain your independence. That's commendable.

Ms. VAN ETTEN. Thank you.

Mr. PEPPER. Next, Mr. Tod Porterfield, age 83, from Indiana.

Mr. Porterfield, we are glad to hear from you.

STATEMENT OF TOD PORTERFIELD

Mr. PORTERFIELD. Good morning, Mr. Chairman. I would like to thank you and the other distinguished members for giving me a chance to talk. I have driven here from my home in Albion, Indiana, a total of over 600 miles, and it has been a horrible nightmare that I lived through and I don't want anybody else to have to.

Mr. PEPPER. Did everyone in the room understand that, that Mr. Porterfield drove here alone, 600 miles, from his home in Albion, Indiana to testify at this hearings?

Mr. PORTERFIELD. My guardianship troubles began in 1984. I had become ill; I have cancer. A large tumor was removed from my stomach, and I was told that I also have a blood disease. But the biggest blow of all was when I lost my wife. I became very ill. After I was released from the hospital and I went home, I decided, what the heck, I live on a farm—why should I suffer? My Lucy is gone and it's not the same, so I'll sell it.

So I contacted a man who had made up our yearly taxes and told him that I was going to put the farm up for sale. I had been approached before that about the sale of the property if I ever decided to leave it.

Then I had to go to the hospital—I started bleeding again. I was very upset. I wasn't eating very well. I remained in the hospital undergoing therapy for my illness in March of 1985. I was moved to a nursing home. I was told before I went to the nursing home that the doctor that was attending me said that I could go home and recover—all I needed was help from the county for them to place somebody, a live-in or a housekeeper, for me.

Instead of going home, to my horror and dismay when we drove past the road that would have gone to my farm, we kept on going. I was forced into a nursing home in another small town. Right then and there I started to object very loudly, as much as I could, about this move. But they dragged me in my wheelchair—I didn't walk well—into the nursing home. I was put into the ward or the section where they put the "I am going to die tomorrow" patients, or the nuthouse patients. And there I was locked up in this room, and I couldn't figure out why.

There was nobody to talk to. I couldn't get any answers from anybody in the nursing home. Well, it turns out that the attorney who had previously told me he would help me make the contract to sell my farm actually had taken over my affairs. From the first of the year until the time I got out of that hospital, I got no personal mail whatsoever—it was all stopped at the farm—and I was given no explanation of monies coming in, bonds, or anything.

Needless to say, I was very shocked and couldn't believe that anybody could do and would do that to me. I did not hire him as my attorney. I had considered him for being my attorney for other things such as making out that contract.

He confined me to a nursing home, where I was robbed of all of my rights. I couldn't get mail. I moved some of my possessions, val-

uable possessions, out of my farm home. He said he would take them for safekeeping. However, many of these have since disappeared—he said he didn't remember taking them, or couldn't locate them. I felt like he owned me and my things. He sure acted like he did. I kept asking myself, "How can this happen to me?"

It wasn't until much later that I found out that I had been diagnosed by a civilian social worker as having Alzheimer's disease. What makes this so shocking is that no doctor in all of my treatments in three different hospitals ever told me that I had any mental condition at all.

I am sorry, I kind of mix this up for you by reading my statement and then saying other things, Mr. Chairman, but this is hard to talk about. I don't want to leave anything out. I was committed in this home under the control of another person based solely on this social worker's opinion.

After four months of the attorney having control of my affairs, I was finally given a real court hearing to make an official determination as to the guardianship. The judge never once asked my name in court—who are you, where did you live, anything like that. He just accepted whatever the lawyer said. Next, I was ordered taken to a doctor to be tested for Alzheimer's disease. The doctor was a general practitioner. It so happened that same doctor was the doctor who took care of me in this nursing home in which I was confined. He had accepted my admittance papers saying I had Alzheimer's disease and he couldn't very well contradict himself.

My test consisted of two questions: Recite the names of the last six Presidents. Count backwards from 25 by 3. As a farmer, I don't read the papers very much and I am not all that interested in general politics.

So when he was through with these tests, he ruled that I was not fit to be given back my properties and control.

In all my 83 years, I have never once run into a situation where I had to do backward counting or anything like that—I use a calculator if I've got something I have got to figure out, and I believe that knows more about it than I do.

Anyway, in spite of the doctor's kind words to my face—that there was nothing wrong with you, Tod, you are all right—he told the lawyer that went up to see me, no, he's not fit to go home. He couldn't even take care of his finances. At least that was the lawyer's statement who was representing me. I had a young lawyer suggested by one of the societies. And I was officially again put under a limited guardianship, this time with a bank.

I never stopped fighting, though it cost me thousands of dollars and a lot of my property. Even worse was the pain I had to bear because I felt so helpless. It really hurt when I was branded an incompetent and no one would listen to me. In June of 1986, I finally had that guardianship ended. It was one of the happiest days, I guess, in my life. This should never have happened to me, and I hope and pray that it never happens to anybody else.

Mr. Chairman, how can a man step in and take over another man's life, and no one even questions it? It is just not right.

I had an attorney, but to him I was just an old man, so everyone just let him control me, like I was one of his possessions. It is very

easy to take advantage of someone just because of their age, and that's what he was doing. And this should be changed.

I thank you.

Mr. PEPPER. Mr. Porterfield, this attorney who had himself made your attorney and got himself appointed your guardian, he was no relation of yours, was he?

Mr. PORTERFIELD. None whatsoever.

Mr. PEPPER. Did you have any relatives in the area, any family?

Mr. PORTERFIELD. Just my wife and myself. We were not natives of Indiana. We moved down there and bought the farm as an investment. We moved there in 1956.

Mr. PEPPER. You were not present when your guardianship was established?

Mr. PORTERFIELD. Never had a hearing. The only indication there was a guardian in my case was I couldn't call anybody. I had no telephone service in the halls or rooms where I was. I would have to go to the desk and ask if I could make a call to try to locate somebody to let them know where I was. No one knew where I was.

Mr. PEPPER. And you said this attorney, when he got to be your guardian, took some of your things out of your home?

Mr. PORTERFIELD. Yes, that's true. They would tell me, your lawyer don't want it—then finally it got to the point where they said, your guardian don't. I said, what are you talking about, a guardian? I haven't got a guardian. I have been to no court. What do I need a guardian for?

Mr. PEPPER. On the subject of whether or not the Federal Government should take any interest in this matter, our staff has determined that of the nations of the world, Great Britain, Japan, France, Canada, and even the Soviet Union have national guardianship laws protecting their people.

If these things had occurred in some totalitarian country, we might accept it as normal. But for these things to have occurred in the United States of America is difficult to believe.

Thank you very much, Mr. Porterfield.

Mr. PORTERFIELD. Thank you, Mr. Chairman.

Mr. PEPPER. Here is a man who was able to drive 600 miles from his home to present this statement that he has made here today, and yet a little bit ago he was under guardianship, as he has told us.

Next is Ms. Etan Merrick, the wife of Mr. David Merrick, age 71, Broadway producer of New York. Ms. Merrick, we are pleased to have you here and thank you very much for your statement.

STATEMENT OF ETAN MERRICK

Ms. MERRICK. Mr. Chairman, members of the subcommittee:

When I was asked to testify before this subcommittee, I was subjected to a rush of mixed emotions. The long chapter of the conservatorship for my husband—which started in June 1983 and ended de facto January of 1985 and de jure in August 1987—has been fraught with conflict, anguish and anger.

During those extremely trying times, I often vowed to somehow, some day, speak my mind concerning the unwieldiness of a system that permitted so many—what I felt were—outright atrocities.

Perhaps one day I will compile my thoughts on this subject and write an article, but in the meantime, I embrace this opportunity to formulate my thoughts and begin to express what I have felt. I am particularly pleased to voice my opinions in front of a body of people who are in a position to ameliorate the laws governing and/or protecting the elderly in America.

The story of my husband is perhaps atypical, but I think it still serves a purpose for this subcommittee. My husband, who may be known to some of you for his work in the theatre, is perhaps too much of an iconoclast to serve as an example of a conservatee, and his life before, during and after the conservatorship has been so convoluted and complex, that the facts about the conservatorship may be obscured by his constant personal drama. David has not arrived at his theatrical legendary stature by chance; he always was, and still is, a master showman. However, if David for all his might, could be a victim of a sometimes wicked system, I am sure it connotes what could happen to others who are perhaps more vulnerable and completely without anyone to help, so I proceed.

When David suffered a stroke in February 1983, the machinery of his business activities came to a grinding halt. David's theatrical, might I call it, empire—in deference to his success, notoriety and profitability—was a business run from a small office with only a handful of employees. Bookkeeping, planning and overall structure were idiosyncratically stored in David's mind. Being an innately private person and an undisputed autocrat, David did not have a substructure that could carry his business in an emergency such as the one happening in February 1983. There was immediate need for action; decisions to be made, contracts to be signed and a second theatrical company to be put together to fulfill an obligation to perform "42nd Street" in Las Vegas in the spring of 1983. In the chaos that ensued, temporary measures were taken via a power of attorney, given to one of David's oldest friends, Morton Mitosky, who, over the years, had had business dealings with my husband and who was generally knowledgeable in the field. "The show went on" in Las Vegas while the New York company continued its run.

Considering the size of David's business and the large financial decisions to be made, it quickly became apparent that a conservatorship was needed. Mr. Mitosky was, needless to say, disinclined to assume all responsibilities without the court's stamp of approval. David was, at the time, severely affected by the stroke which had been massive. His speech was garbled, and often completely impenetrable. His movements were only slightly impaired, but his emotions markedly labile and his social behavior erratic.

David was in agreement about instituting a conservatorship, even though I doubt that he really understood the meaning of it at the time, but when the documents were presented to him and he realized that someone else would rule his world, so to speak, for two years to come, he raged and fumed. However, from every point of view, the necessity for a conservatorship was beyond dispute. Judge Hilda Schwartz made an unusual recommendation that the conservatorship be reviewed after two years, not have the customary unlimited duration.

At my husband's request, I was made co-conservator in the fall of 1983, and Mr. Mitosky, recognizing the redundacy of two people sharing the conservatorship duties, resigned in February 1984, thus leaving me the full responsibility of my husband's affairs.

At the helm of David's business, I underwent grueling scrutiny for my every move. One judge erroneously declared "illegal" my attempt to have my husband's prime, and, at that time, only product, "42nd Street" produced in other English spoken countries, i.e., Australia and England. The musical "42nd Street" was naturally not a frivolous entertainment hobby. It had become a high-powered commodity which had then generated revenues of perhaps $20 million in the U.S.A. alone. Not exploiting all possible venues to form other theatrical companies would have been tantamount to dumping a crop of wheat, or burning an automobile factory.

The same judge demanded a hearing which would determine my future suitability as David's conservator. Now, the machinery of court-appointed guardians and their staffs of lawyers, paralegals, secretaries, word processing operators, messengers and the attendant cost of Federal Express and overseas couriers, et cetera, et cetera, reached a frenzy, and accountants and lawyers were working overtime to control the controllers. How very fortunate that David had worked a lifetime and amassed enough money to pay all these people to "protect him."

The lawyers who participated in this case read like a chapter out of Martindale-Hubbell. The patronage system was in full bloom. How very ironic that David's theatrical multimillion dollar business, which had been conducted out of his hip pocket before his illness with only one or two trusted assistants, now necessitated an army of expensive professionals guarding each other.

At this point David was functioning much better than previously, and with me, his wife, at his side, and the assistance of his office manager and the writers, choreographers and stage personnel from "42nd Street," this collective body of people was able to conduct business, more or less, as usual.

Considering the obduracy and cost of the conservatorship, my husband and I jointly determined to attempt terminating the two-year conservatorship sentence. A system, that had proven unyielding to our personal circumstances before, now became granite in its resolution to make us prove our capabilities, and the cost of the termination procedure alone could probably have supported a small South American country for a year.

However, our hard-won victory was celebrated in January 1985 when a judge declared, after a trial, that David was capable of handling his own affairs again.

This is an abbreviated version of my experience with conservatorships. Out of that journey I have developed a couple of views and recommendations, which I hope this subcommittee will consider in connection with proposed legislation in this area.

I believe it is imperative to abandon the practice of conservatorships of unlimited duration. We require that the records of achievement of our Congressmen be reviewed every two years. It is not unreasonable to require that those who administer the estates of the elderly similarly be reviewed every two years.

In our case I feel that the judge showed remarkable foresight in directing that our conservatorship be of a two-year duration. Such a practice would give conservatees a ray of hope of a normal life, should they recover sufficiently, and it would also serve to keep conservators on their toes, knowing that they are to be evaluated not only by their fiduciary annual accountings but also for their personal, humanitarian service for the conservatee, which to me seems equally important.

My second recommendation is a very strong objection to the patronage system, which should be removed entirely from the administration of the estates of the disabled and the elderly. Perhaps the Federal Government could construct an organization of salaried employees, whose only function would be the administration of conservatorships, wherein the assistance and cooperation and advice of family and close friends would be sought, thus eliminating an arena of political machination often resulting in long distance, impersonal care by functionaries who often view their wards as vehicles for fees.

Again, to reiterate what I have already stated, if my husband could be victimized by the system as it now exists, I can only imagine what could happen to others, who do not have his resources.

Thank you.

Mr. PEPPER. Ms. Merrick, you have given us an excellent statement and we are very grateful to you for coming here to testify today.

You have made two very important recommendations. One is that there should be an automatic limit on guardianship once it is established. I guess the reason that is not generally done is because the court is presumably always open to the revocation of the guardianship order, but it is very difficult to get it to do so in many cases.

Ms. MERRICK. Right.

Mr. PEPPER. So I think your suggestion that there be a limit is an excellent one. It might even be one year instead of two years as the judge who issued the original order of guardianship provided.

The second thing is the cost, especially in cases where the person who is the victim of the appointment is a wealthy person with considerable business interests.

Would you care to make an estimate as to how much this guardianship cost you and your husband?

Ms. MERRICK. It must be at least a million and a half dollars, I think, conservatively.

Mr. PEPPER. From what you say in your statement, it would be quite a large sum of money.

Ms. MERRICK. Yes.

Mr. PEPPER. All these people who were appointed to carry out the guardianship—it was a sizeable sum of money, was it?

Ms. MERRICK. Right, definitely.

Mr. PEPPER. Now, that shows that even a wealthy and famous person may be the victim of questionable guardianship proceedings if they are not carefully monitored. It might be that the States, or even the Federal Government should provide somebody to check up on the situation. We will see whether the Associated Press has any recommendations about how this matter can be handled.

It is very interesting for the public to know that even famous and distinguished people like your husband can be the victims of this procedure. We thank you very much for your excellent statement and for your coming here to be with us.

Ms. MERRICK. Thank you.

Mr. PEPPER. And give our best wishes to your husband.

Ms. MERRICK. Thank you.

Mr. PEPPER. Next is Mr. John Hartman, former public guardian, currently an inmate at Community Treatment Center in Detroit.

Mr. Hartman, we are pleased to hear you.

STATEMENT OF JOHN HARTMAN

Mr. HARTMAN. Thank you. Good morning, Mr. Chairman, and members of this subcommittee. My name is John Hartman. On August 25, 1985, I pled guilty to embezzling funds from a disabled veteran for whom I served as court-appointed public guardian. I also admitted at that time to embezzling a total of $129,506 during my eight-year tenure as public guardian in Bay City, Michigan.

On October 22, 1985, I received a five-year sentence. I am currently serving that sentence at the Community Treatment Center in Detroit, Michigan.

I want the subcommittee to know that I am here today because I deeply regret the actions that led to my conviction and incarceration. I am here voluntarily in the hopes that my cooperation with the subcommittee may help to ensure that what I did never happens again.

In 1976, at the age of 23, I answered a newspaper advertisement for a public guardian job in Bay County, Michigan. At the time, I was working as a janitor in a local tavern. I did not know what a public guardian was, but I was looking to improve my quality of life. Even though I knew nothing about accounting and had no training in social work, and the only legal training I had was one course in criminal justice, I was hired.

In January of 1977, without any training, I began to take on wards. Serving as people's legal guardian, I had complete and final legal control over their actions and finances. By the end of my first year, I had approximately 80 wards and $350,000 in their income and assets under my control. By 1978, the only other public guardian in Bay County left, and as a result, my caseload grew and grew. By 1984, at the height of it, I had at least 210 wards and was overseeing $1.5 million in income and assets.

In 1978, the public guardian's office closed, but I was told that I was still expected to serve as guardian to those wards then under my control. It was at this time that I began to commingle my wards' money with my personal monies. I had developed debts and liabilities and used approximately $30,000 of my wards' monies to pay these off and to meet my own expenses.

I set up a checking account into which I deposited the income of my wards, mostly Social Security checks or veterans' benefit checks, monies from the sale of wards' assets, and my own income. I withdrew money from this all-purpose account to meet debts and liabilities.

When I started the job in 1977, I was making $9,800 a year. At the time of my apprehension in 1985, I was making $21,000 a year. But at the same time I was handling millions of dollars. As I said, regretfully, over eight years, I misappropriated approximately $130,000 from wards' accounts. Of that amount, I used $27,000 to make up deficits in wards' accounts. I let some wards spend money that they didn't have. I was able to do that by tapping the accounts of other wards. I spent $83,000 of the total on bad investments, including the purchase of gold and stocks; with $9,000 of wards' monies I purchased a computer system and furniture for my office. I made approximately $4,000 in loans. I had no authority to do any of this and I am fully responsible for my actions.

How was I able to so abuse the guardianship authority I was given? It was very simple. No one bothered to really check what I was doing. By law, I was required to file with the probate judge an annual accounting on each of my ward's well-being and finances. These reports were supposedly reviewed by the court administrator. However, these reports were viewed by everyone in the system as merely a formality and they were almost universally automatically accepted, no questions asked. Occasionally I would get a call from the court administrator saying, "Some of the figures don't add up. Can you fix it?" And I would fix it.

At no time was I required to substantiate what I had recorded on the financial statements. No one ever checked my checking account. No one ever looked at a bank statement. To my knowledge, there wasn't even anyone with expertise in accounting involved in the whole system. If anyone would have bothered to check, they would have seen that I could not verify that the balances I claimed in my wards' accounts were actually there.

Even though I was serving as public guardian, I had no supervision from county or State officials. There was a Board of Directors of the public guardianship program made up of representatives of the State Departments of Social Services and Mental Health, the probate court and the Social Security Administration. They met when they hired me, but to my knowledge they did not meet once during my eight years as a guardian. They certainly did not maintain contact with or oversight of me, the one public guardian.

Who were the people for whom I served as guardian? Most were elderly or disabled, poor and alone. Sixty percent were senior citizens, many of whom were impoverished nursing home residents whose only money was a $25 monthly personal needs allowance. Approximately 25 percent of my wards were mentally retarded who most often lived in institutions and had been abandoned by their families.

Some of my wards were young and some well-to-do. One of my wards was a 14-year-old girl whose parents had passed away and left her with an $80,000 estate, Social Security survivor's benefits and private pension benefits.

In addition, I had one ward with a half a million dollar estate, and five or six who were worth from $200,000 to $250,000.

The public guardianship system is currently unregulated. It allows those who choose to do so to abuse the rights of and steal from mostly helpless people. The system is so unchecked that it en-

courages people who in other situations would not have done so to act in an illegal, reprehensible manner.

There must be much tighter control over guardians. The regular imposition of basic checks such as requiring that copies of checkbook registers and backup bank statements accompany financial reports would eliminate much abuse.

There should also be prior and ongoing training of guardians and there should be a limit on the number of wards one guardian can have.

Thank you. I will try to respond to any questions that the subcommittee may have.

Mr. PEPPER. In relation to your testimony, Mr. Hartman, which reveals the need of supervision over another aspect of this critical problem, the staff has discovered that only half of the States require that guardians file an annual report of their wards' well-being.

Six States do not require any financial accounting of wards' monies or accounts.

Now, in this particular case where the matter is failure to scrutinize, failure to observe and correct errors in the handling of guardians' accounts, that may be more exclusively within the jurisdiction of the States. The Federal Government can't assure that the States have performed effectively and efficiently all of the functions that they are charged with carrying out.

However, we could, through a uniform system of State laws that the Federal Government would recommend, in conjunction with the American Bar Association, for example, and maybe with the recommendations of the Department of Justice, if we can enlist the cooperation of the Department of Justice under this administration, we could provide more stringent rules and regulations relative to such reporting, as you pointed out here as desirable.

Your own wrongdoing, which you show a commendable repentance for, and your being here today and your desire to try to protect other accounts against the sort of abuses that you committed is commendable. We appreciate your desire to be helpful.

It may have been just one of those times when your weakness got the better of you and you allowed what had been an honorable life to become stigmatized with crimes. And now you are having to pay the price for it in the sentence that you are serving. But you are showing a commendable regard for the public interest in being here today. We appreciate very much your coming and pointing out from your knowledge of the problem the desirability of stricter, tighter accounting rules and regulations to protect these people against those who are chosen to protect them. Somebody who represents the public interest must see to it that these guardians are very carefully observed and their reports closely scrutinized.

Thank you very much, Mr. Hartman.

Mr. HARTMAN. Mr. Chairman, if I may?

A moment ago when Ms. Merrick spoke, she talked about Federal officials, being appointed to supervise guardians and conservators. I would like to point out that the Veterans' Administration does that for all veterans, and that is something that the subcommittee may want to check into.

Mr. PEPPER. The Veterans' Administration does that—I am glad to know that. That is a good example, maybe, for us to observe.

Mr. HARTMAN. It is an excellent example for the committee to follow, and I am certain that with a little bit of beefing up of their staff and the renaming of their people they could supervise a much larger group.

Mr. PEPPER. Very well. Thank you very much, Mr. Hartman.

Now the next witness and the last of this panel is Mr. Jim Godes, an investigator of ours. Mr. Godes, we are pleased to have your statement.

STATEMENT OF JIM GODES

Mr. GODES. Good morning, Mr. Chairman. My name is Jim Godes, and I am currently working as an investigator for the Subcommittee on Health and Long-Term Care. I am here this morning to report to you the findings of part of the subcommittee's investigation into the nature and extent of abuses in the guardianship of the elderly.

Under the instruction of the chairman, this subcommittee undertook to determine the ease with which a person might be placed under guardianship. Would the process take months, weeks, or hours? What type of evidence was required of the elderly person's incompetence? Would the elderly person have to appear at the hearing or even be represented by counsel? Finally, what types of follow-up or accounting procedures are required?

What we found was that there was a notable lack of unifority in the way in which the guardianship dilemma is dealt with. While some courts do an admirable job of protecting the rights of the elderly, many fail miserably. The apparent ease with which a person with some initiative can obtain a guardianship in many areas of our country is simply shocking. And this is even more surprising in light of what the prospective guardian has to gain, and what the elderly person has to lose.

By way of example, I would like to share with you now an experience that I had sometime ago while inquiring about guardianship in a State court system. For the purposes of this investigation, I sought information concerning getting guardianship over a fictitious aunt, who was 71 years old.

I began by setting up an appointment to see the people who worked in the department dealing with guardianships of the elderly. I was initially told that the process would take six weeks to complete; attorneys would have to be appointed; I would have to post a bond; and a lot of paperwork would be involved.

However, after spending some time relating the hardships of caring for sick relatives, they became very sympathetic and very supportive. They now stated that I could probably avoid attorneys altogether, that the bond could be waived, and that my aunt need not be present at any time. Best of all, I was told that I could walk the petition through the process in a couple of hours. I would be required only to file a nominal filing fee, obtain opinions from two doctors documenting her present condition, and get her to sign a consent form, and I would be "in like Flynn."

Well, after hearing this, one can guess what any unscrupulous nephew trying to get his hands on his aunt's estate would do—either attempt to convince or coerce the elderly person into signing the consent form, thereby signing away his or her rights. Now, the consent form is very simple, stating only that the proposed ward has read the guardianship petition and that he or she consents to guardianship. The form does not include any warnings or explanations, what is guardianship? Nor does it require that any witnesses be present other than a notary public. The sheer simplicity of this form could easily be deceiving and misleading to an elderly person.

The medical forms suffer from the same malady as the consent forms, in that they do not provide sufficient information. These medical forms carry great weight in the determination of whether or not to deprive an elderly person of all her rights, or his rights, and yet nowhere on the form is there a space for the physician's address, the physician's phone number, a medical license number, even the State of practice, or, most importantly, the bases for the opinion of incompetency. We also discovered that, in a significant number of States, listing the diagnosis merely as the "effects of advanced age" would be sufficient grounds to brand an elderly person incompetent.

In this particular instance, we listed, "effects of advanced age" as the diagnosis, including "loss of dexterity" and "lack of agility" along with "forgetfulness." I then took all the forms down to the guardianship office and had the staff there review them. I was complimented on the fine job I did on them, and they further expressed optimism that the problems with my aunt would soon be over. It made me very uncomfortable that for less than $100 and a couple of hours worth of work I could essentially buy my aunt and her estate.

I would very much like to be able to say to you, Mr. Chairman, that this incident was an isolated one, but from our investigation, and the appearance of all of these fine people who had to actually live through an abusive guardianship, that does not appear to be the case. We discovered that in many counties, the sympathy of the courts, indeed the whole focus of the process, lay with the person petitioning for guardianship, and not with the elderly person, the one who stands to lose his or her rights and dignity. In many cases, the guardianship becomes a political issue, with the elderly person being used as a pawn in a battle between judge, attorneys and family members.

After a guardianship is granted, most States require infrequent accountings to the court, or no accountings at all. Even when these follow-up procedures are mandated, they usually involve only accountings of the guardian's treatment of the ward's funds; very few States inquire into the guardian's treatment of the person—of the ward. Once again, we see the elderly person overlooked in the system.

Mr. Chairman, you have heard from some very dynamic witnesses today who have had to endure an abusive guardianship in one form or another. All that I can really add to their testimony is that I have seen how the system allows for the type of treatment of which they speak.

I would only urge that the Congress recognize the need for reform in this area, and that it take whatever steps are necessary to prevent this senseless punishment of our elderly.

Thank you.

Mr. PEPPER. Thank you very much, Mr. Godes, for your excellent report.

We are informed that there are about half a million people in the country who are under guardianship. About half of those had no attorney to represent them and about half of them were not present in court when the guardianship was established.

Imagine having a guardian appointed for you and taking your civil rights, your voting rights, your property rights, your right to move around, to stay where you want to, and the like, being taken away from you. So this is no small matter, no minor matter.

I remember very well my elderly mother-in-law, my wife's mother, how broken-hearted she was when she lost her driver's license. If they were to take my driver's license away from me I would feel the same loneliness and the same mortification.

We have heard these witnesses here today and every one of them has been a heart-rending case. Yet, think of all those other hundreds of thousands who are out there in the country whose cases we don't know about in detail—people whose testimony we won't hear. And the cases that are coming up every day—some at this very moment—all over America. County judges, probate judges, are appointing guardians. They don't seem to realize what terrific significance their action has. And we must some way or another arouse public interest in the matter, just as we have tried to arouse public interest through the years in protecting the elderly against abuse, even from their own family.

A lot of times we have heard instances of where a son not only took his mother's money away from her but attacked her sexually as well. And the poor mother, not having anywhere to live, was fearful that if she reported it to the authorities the son would throw her out of the house—she wouldn't have any place to stay.

So if we are concerned at all about the elderly and the disabled in this country, we have got to find some way to give them the protection that a citizen of the United States is entitled to enjoy.

Well, to all of you on this panel, I want to express the warmest thanks. I hope your good efforts today have helped somebody else avoid the unhappy experiences that you have had.

Thank you all and have a safe and pleasant trip back home.

I hope you will enjoy your airplane flight back home, Ms. Monoff.

Ms. MONOFF. Thank you.

Mr. PEPPER. And be careful with your drive back, Mr. Porterfield.

Mr. PORTERFIELD. Thank you, Mr. Chairman.

Mr. PEPPER. Thank you all very much, I appreciate your having been here.

Ms. VAN ETTEN. Thank you.

Mr. PEPPER. Now the next panel will tell of a very outstanding example instance of journalism, it seems to me, in America. The first witness will be Mr. William Ahearn, managing editor of the Associated Press of New York, accompanied by Mr. Fred Bayles,

senior reporter of the Associated Press, from Boston, and Mr. Scott McCartney, senior reporter of the Associated Press from Dallas, Texas.

The next witness will be the Honorable John Pickering, Esquire, Chairman of the Commission on Legal Problems of the Elderly of the American Bar Association.

And the next will be Ms. Nancy Trease, Esquire, Legal Aid Service of Broward County, Florida; and Mr. John Regan, professor of law of Hofstra Law School of Hempstead, New York.

We are very grateful to you with the Associated Press and the other agencies represented for being here with us today.

We first will be pleased to hear Mr. William Ahearn and your associates, Mr. Bayles and Mr. McCartney.

Mr. Ahearn.

PANEL TWO—SCOPE OF THE PROBLEM AND NEEDED REFORM: CONSISTING OF WILLIAM E. AHEARN, MANAGING EDITOR, ASSOCIATED PRESS, NEW YORK, NY, ACCOMPANIED BY FRED BAYLES, SENIOR REPORTER, ASSOCIATED PRESS, BOSTON, MA; AND SCOTT McCARTNEY, SENIOR REPORTER, ASSOCIATED PRESS, DALLAS, TX; JOHN H. PICKERING, CHAIRMAN, COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, ON BEHALF OF THE AMERICAN BAR ASSOCIATION; NANCY A. TREASE, ESQUIRE, LEGAL AID SERVICE, BROWARD COUNTY, FL; AND JOHN J. REGAN, PROFESSOR OF LAW, HOFSTRA UNIVERSITY SCHOOL OF LAW, HEMPSTEAD, NY

STATEMENT OF WILLIAM E. AHEARN

Mr. AHEARN. Mr. Chairman, we thank you very much for inviting us to appear here today.

You have a very lengthy statement that I submitted to you. It simply explains the process that the AP went through to explore guardianship. I don't think there is a need for me to read every word of that.

I will simply say that you have had some living testimony to guardianship here this morning. What the AP produced was more than 311 stories nationwide, a six-part series, and 20 sidebars for our main news wire.

The two gentlemen to my left over a period of a year have become experts on guardianship. Most of our reporters who have worked on this consider themselves, I believe, experts on the guardianship situation in their home States too.

This topic was chosen because we realized—we strongly felt that it was one that had not been reported on very much by the national press. Several newspapers had looked at guardianship in their States, but no one had looked at guardianship in 50 States and the District of Columbia.

The Associated Press, because of its resources, uniquely established throughout the country to be able to do a project like this, and that is how we were able to do it.

It was a very long year, many thousands of hours of work went into this project. You have the other details in my statement, and the project itself is out there in 311 stories and what these gentlemen produced.

We would be very happy to answer any questions you have on any of those stories.

[The prepared statement of Mr. Ahearn follows:]

PREPARED STATEMENT OF WILLIAM E. AHEARN, MANAGING EDITOR, ASSOCIATED PRESS, NEW YORK, NY

We thank you for inviting us to this hearing to explain our project on guardianship of the elderly.

In August 1986, The Associated Press began what was to become a year-long nationwide examination of guardianship in the 50 states and the District of Columbia.

The AP began the biggest investigative project in its history when Managing Editor William Ahearn assigned Fred Bayles, a national writer based in Boston, and Scott McCartney, a regional writer based in Dallas, to do preliminary reporting on guardianship. They traveled to eight states over a six-month period, interviewing judges, lawyers, guardians, wards, state officials and college professors.

The AP then selected one staffer in each state and the District of Columbia; because of the size and number of elderly residents, two staffers were assigned in California, Florida and Texas and three in New York state. Planning meetings were held with those staffers in San Francisco, Dallas, Atlanta, Boston and Pittsburgh in February, and the AP nationwide effort was launched.

Reporters pulled at random more than 2,200 guardianship files, dating back to 1980. The information in the file—from petition to examination to competency ruling to annual accountings and reports—was transferred to a standard form developed by Bayles and McCartney. That information was then fed into a computer to produce statistics on guardianship.

Initially, AP reporters in Delaware, New Mexico and New York were denied access to files. AP worked with its law firm, Rogers and Wells of New York and eventually gained access to files in those states.

Along the way, AP staffers conducted hundreds of interviews. Staffers were kept abreast of what their counterparts were finding through weekly memos distributed to all those working on the project.

The result was packages of stories in all 50 states and the District of Columbia scrutinizing guardianship of the elderly in that jursidiction. Their number totaled more than 300 nationwide. Bayles and McCartney, who traveled to 25 states themselves over the year, produced a six-part national series based on their reporting and the state staffers' work.

All of those stories were transmitted on AP's national and state news wires to the news agency's more than 1,350 member newspapers and were for use beginning Sunday, September 20.

The AP found that America's elderly who are being placed under guardianship are losing their civil rights with little or no evidence of necessity, sometimes with just a quick pen stoke, and the courts charged with following their lives are often failing at the task.

In 43 percent of the 2,200 cases studied, senior citizens were taken through court without an attorney representing them. Forty percent of the wards weren't at their own hearing, and one-quarter of the cases didn't even have a hearing.

We also found that three out of 10 files had no medical evidence to indicate incompetency or incapacity. Annual or periodic accountings of money were missing or incomplete in 48 percent of the files. And 13 percent of the files were empty but for the granting of guardianship powers.

We estimated there are between 300,000 and 400,000 elderly Americans under guardianship today. No one knows for sure; most states don't keep track of court guardianship statistics. Many courts told us they had no idea how many guardianship cases were under their jurisdiction, how many wards were still alive.

Beyond the files, we found elderly citizens whose lives had been uprooted by the system. You've heard some of the stories already, and there are many more. A Bennington, Vt., woman learned she was placed under guardianship only when told by her nursing home she could no longer spend her money without her guardian's approval. A Colorado woman remains in a Grand Junction nursing home against her wishes because the judge in her case says it was reviewed in 1984, and his decision stands.

We also saw cases where questionable spending, and misspending, had been routinely approved by judges. A San Diego court signed off on the annual accountings filed by an attorney acting as guardian. Not until after the ward's death did a friend become suspicious about the handling of the estate, and the attorney was con-

victed of theft and perjury for taking hundreds of thousands of dollars in cash and bonds.

The co-guardians and other family members of a wealthy Seattle woman have paid themselves $250,000 in gifts over seven years. The guardian of a Kansas World War I veteran ran through $112,000 in a little more than a year, paying for a car and car repairs for a relative, spending $1,800 on a hotel stay in San Francisco and loaning $2,000 to a relative who built kitchen cabinets. The Veterans Administration challenged that case.

In Arkansas, a woman who was guardian for her father-in-law charged expenses that included $50 for one hour's work on "preparation for arrangements" for the man's 1981 burial, another $50 for an hour's work relaying word of the man's death to relatives, and $71 for mileage to the out-of-town funeral.

We found the court systems overtaxed, understaffed, underfunded and often at a loss to explain missing reports and empty files. We also heard predictions about the future of an already ailing system faced with a growing elderly population.

One jurist, Providence, R.I., Probate Judge Anthony B. Sciarretta, summed up the problems by saying: "I don't know where the wards are, who's caring for them, what they're doing. I have no support staff, I have no welfare workers, I have no aides, I have no assistants, and I have no money."

Again, we thank you for inviting us to this hearing, and we would be happy to answer any questions you may have about our findings.

Mr. PEPPER. Do you have a separate statement, Mr. Bayles?

Mr. BAYLES. We don't have a separate statement but maybe we can talk about a little bit of the findings that the AP reporters found in a year of research.

Mr. PEPPER. Without objection, your written statements will be filed in full in the record and you may summarize them as you would please to do.

STATEMENT OF FRED BAYLES

Mr. BAYLES. Part of the investigation involved looking in case files. We have looked at about 2,200 case files from around the country. One of the things we found which you have spoken to already is the lack of due process, the lack of legal representation and legal rights that many of the elderly face when they are placed under guardianship.

In our look at these case files we found that 44 percent of those facing guardianship were unrepresented, they had no attorneys to represent them in the court; in fact, nearly 50 percent of them were not at the hearings to determine whether they were competent or not.

Thirty-four percent of the cases we found there was no medical evidence in the court files to show whether or not this person was competent.

Again, in many of the cases that we looked at, the filing of the petition was basically the first, and in a lot of cases, last step to placing this person under guardianship.

Mr. McCartney, who was my partner on this, can speak a little bit to what happens to you after you are placed under guardianship.

Mr. PEPPER. Thank you.

Mr. McCartney, we will be pleased to have your statement.

STATEMENT OF SCOTT McCARTNEY

Mr. MCCARTNEY. We found, Mr. Chairman, that once a guardianship file was open, often the court completely lost track of both the paper work and the person. And about 48 percent of our 2,200 files

were missing at least one annual accounting, or the accounting was incomplete.

In 13 percent of the files, there was nothing there but the opening of the guardianship, there was no indication of what had happened since then; there wasn't a single annual accounting, a single report.

Only about 16 percent of the files had any kind of report on the status of the person. Some courts merely check on the money but not on the care or well-being of the person.

There are some exceptions we found; some courts do a good job of keeping track of it; some even require receipts and bank statements; in California they have a system where they send investigators out to check up on the person every other year, where they also have——

Mr. PEPPER. How often?

Mr. MCCARTNEY. It happens when the petition is filed and then every other year after that, so it would be every odd number year.

They also have some accountants in the probate court to actually audit the accountings when they come in. We found that to be very rare that that actually happens in other States.

Mr. PEPPER. I believe one of you stated that your investigation affirmed there are about 500,000 cases of guardianship in the country?

Mr. MCCARTNEY. We estimated about 300,000 elderly in the country. One of the problems is that nobody knows, including the courts that are charged with overseeing the guardianship. Obviously the Federal Government is not charged with keeping track of the number. Most of the States that we looked at did not have a number at the high court level.

We went to each county in many cases to try to find out the numbers and many of the courts there said they just couldn't keep track of the cases under their jurisdiction. So based on our research, we estimated 300,000. It may be higher than that.

Mr. PEPPER. And you found in some instances there were no records of guardianship? There were no records in the files?

Mr. MCCARTNEY. We found that in 13 percent of the 2,000 files we looked at, there was nothing there beyond the opening of the guardianship. The guardianship powers had been granted and those people never came back to court, and the court never checked up on it.

Mr. PEPPER. So these victims of guardianship were just lost people. That is, they were lost in the shuffle?

Mr. BAYLES. We have cases where these people have disappeared. In one case in one State the guardian was found to have stolen some money from them and wanted to pay the money back, and there are still State investigators out there looking for the wards because they have lost track of them.

Mr. PEPPER. I believe you said you found, as we have, that about half of the people were not present at the hearing when they had the guardian appointed, and about half of them had no attorney to represent them.

Mr. BAYLES. That is right.

Mr. PEPPER. Did you notice in what percentage of the cases members of the family applied to be guardians?

Mr. McCartney. In about 75 percent the guardian was some sort of relative, and 25 percent was public guardian, or an attorney, or a bank, or somebody not related.

We also found that—you said half were not at the hearing and half didn't have a attorney—we also found about a little more than a third had no medical evidence in the file.

Mr. Pepper. Did you find any evidence of the judges following the practice that Ms. Merrick said the judge had followed in Mr. Merrick's case of limiting the guardianship to a 2-year period, or some set period?

Mr. Bayles. No, that is highly unusual.

Mr. Pepper. You didn't find any?

Mr. Bayles. No, I can't say that——

Mr. Pepper. Once the guardian was appointed, they were just lost in the shuffle.

It is rather interesting today that these people all had the initiative and the enterprise, although they had unfairly been made the victim of guardianship, to get the guardianship finally terminated. One of them went around studying the subject and all. And you notice it took a good little bit of initiative as well as a good little bit of ingenuity on their part to get the guardianship vacated. They were able to accomplish that, although many others are not so fortunate.

I suspect that, in general, the victims of these appointments are either elderly people or disabled people; is that right?

Mr. Bayles. That is right.

Mr. Pepper. Mr. Ahearn, your investigation covered the period of a year?

Mr. Ahearn. A year to carry out, Mr. Chairman. It took a year to do.

Mr Pepper. And what occasioned the Associated Press undertaking this inquiry in the first place?

Mr. Ahearn. I saw a short newspaper article that said a convicted felon had been made the guardian of a woman and had basically stolen $17,000 of her money, and was being forced into making restitution. I had not known about guardianship before. The story said in the last paragraph that 24 other States had some type of guardianship law. I thought we ought to look into it. So Mr. Bayles and Mr. McCartney were asked to look into it and they traveled to eight States over a period of six months investigating it, including your home State of Florida.

We realized that we had a very good story here. And the only way to really look at guardianship was to look at it in all 50 States, because it varies, from county to county, from State to State. So the AP then appointed a reporter in each State, with the exception of the three States where more than one were appointed to look into it.

We held various sessions across the country with these reporters to explain to them guardianship because most of them had never heard of it before. Then we gave them the guidelines for investigating this topic. We set out to find out how guardianship worked, the good points of it, and the bad points of it, and is it working. We did not set out with any predetermined idea on what we would find.

Mr. PEPPER. You ought to get a Pulitzer Prize for this, because it certainly was a very commendable initiative the Associated Press took in looking into this critical matter. Nobody had even looked into it in such depth before.

Did you find any evidence of any previous nationwide investigation?

Mr. AHEARN. No, there had not been any that we knew of.

Mr. PEPPER. When did we first hear about it, the problem? When did we begin to be aware of it?

Ms. GARDNER-CRAVEDI. Elderly abuse in 1978.

Mr. PEPPER. We ran into the problem in 1978 when we began to go into the problem of abuse of the elderly. We had in mind physical abuse, largely, or something akin to physical abuse. For example, I mentioned a while ago about a son financially and sexually assaulting his mother.

We had a case of another kind of abuse in Boston—the violation of one's rights. A mother had a very comfortable home. She had two or three children, one of whom was a daughter who had three children, I believe. The daughter asked the mother one time if she could come and live with her. But, of course, the mother said, sure, you are welcome. She was glad to have the daughter, the grandchildren in her home. Within hours after the daughter and the children moved in, the daughter put a notice up in the mother's kitchen limiting the time when the mother could be in her own kitchen. Shortly after that, she parked her car in the family garage behind the mother's car so the mother couldn't get out without the daughter moving her car. One denial of privilege after another occurred on the part of that daughter to her mother. So finally the mother, who could not bear to tell her own daughter to get out, sold the home, and they all had to move. So she had to move, along with the daughter and her children, out of her own home—another kind of abuse.

So you are the first to have really examined guarianship on a national basis, and brought it to the attention of the national authorities.

And we are also delighted to have here today the American Bar Association. We are hoping that maybe we might have you invited back before the Judiciary Committee of the House of Representatives, so that you can help us formulate recommendations or legislation in the wake of this investigation. So this is a very important contribution to the public interest I think you people with the Associated Press have made.

Some people think that in America your rights are all automatically guaranteed because we profess to protect people against the abuse of their rights. They are not automatically protected—it takes vigilance on the part of somebody. There are some people who attack the Federal Government for interesting itself in these problems—they say it's a State matter. But they forget the fact that every person in the United States who is a citizen is a citizen of two sovereignties: the Federal Government and the government of the State in which they reside. So, in fact, the Federal Government has sovereignty over them also. And the Federal Government has the right to see that its citizens are fairly protected, at least as far as the Federal Constitution is concerned. We are not just talk-

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ing about States' rights that may have been are abused which, of course, are primarily the prerogative of the States to protect.

But I think that the principles, at least, of the equal protection clause under the due process clause of the Fourteenth Amendment empower us to protect these people against these kinds of abuses.

Is there anything more you would like to add, Mr. Ahearn?

Your statements will all be included in full in the record and will be carefully studied. In due course we will be issuing our reports with your statements in them.

Mr. AHEARN. Just as sort of a personal note, speaking for the two gentlemen to my left, when we first launched this project, I don't think any of us ever thought we would be in a room seeing many of the victims of what we would soon report on in that room and hearing their testimony.

Everybody on the panel today—your first panel—was mentioned in the AP stories, with the exception of your aide who did the undercover work.

I just want to thank you for your kind and generous comments about the AP project.

Mr. PEPPER. Mr. Ahearn, you and your associates, do you have any recommendations to make?

Mr. AHEARN. With all due respect, it is not our job to make recommendations. These series of stories we did did have comments from the various experts in the field—judiciary members, ABA members, and so forth, and committees looking into guardianship in some States, and Mr. Bayles and Mr. McCartney can quickly sum those up. You have made some comments yourself, sir, this morning that were reiterated in that series by others.

Mr. PEPPER. Mr. Bayles, do you have anything further to say, any recommendations to offer?

Mr. BAYLES. As Mr. Ahearn said, there are a number of recommendations out there and I think you are about to hear about them from Mr. Pickering and the rest of the panel.

The National Judicial College and the American Bar Association looked into this matter last year at a conference in Reno, Nevada and they have come up with a number of recommendations, I believe, Mr. Pickering will be speaking to. But basically we are talking about steps to make this a more formal process to ensure that people's due process rights are protected, and to ensure that the courts do their job in protecting those who were placed under guardianship.

Mr. PEPPER. Very good. Thank you, Mr. Bayles.

Mr. McCartney, have you any recommendations to make, or anything further to add?

Mr. MCCARTNEY. No, I think the only other thing we found was that on the local level there were some judges—and I mentioned some of the reforms California has instituted—but just some judges who have locally taken it upon themselves to appoint attorneys for everyone who comes through the court and to make sure that medical statements are detailed. And just little things like that seem to make a big difference in what we saw in the files.

Mr. PEPPER. With respect to the Federal jurisdiction in the matter, this subcommittee has also made rather a long and serious study, and issued one or two reports with the GAO and other agen-

cies, on the abuse of residents of nursing homes. Now there we have a measure of jurisdiction because most of the funding for the care of people in nursing homes comes from the Federal monies—Medicare or Medicaid funds.

The Federal Government also puts up a lot of money for the States to investigate the care of people in nursing homes. But right now it is largely on the initiative of this subcommittee that we are recommending the creation of a bill to rights for the residents of nursing homes—to be posted on the walls. That way people can know what their rights are in the nursing homes.

We are not trying to meddle in somebody else's business; we are trying to carry out our business, which is the protection of our people against abuses that are not being prevented by others.

The Federal Government gets into the drug problem, for example, because that affects the national health and national morale, and national security of people and the like. So your having entered into this matter as a national organization I think will help us to get some recognition of the problem at the national level—at the very least to have the Federal Government aid the States but also to see to it that they do what they are supposed to do.

Mr. Ahearn, we want to thank you very much, you and Mr. Bayles and Mr. McCartney and the Associated Press, for this very fine contribution that you have made.

Thank you very much.

You might like to stay and listen.

Mr. Pickering, we are delighted to have you here from the American Bar Association.

I have the honor to have been a member of that organization for over 50 years and we have great respect for it. We are delighted to hear your testimony and whatever you may be able to recommend to us.

STATEMENT OF JOHN H. PICKERING

Mr. PICKERING. Thank you, Mr. Chairman.

As you have said, I am here on behalf of the American Bar Association. I chair its Commission on Legal Problems of the Elderly. I am glad that on the panel here today is a former distinguished member of that Commission, indeed a former Vice Chairman of the Commission, Professor John Regan. I have a prepared statement which I shall summarize.

Let me begin by congratulating you and your subcommittee on holding these hearings to focus national attention on the growing problem of guardianship—as our society gets older there is going to be more and more need for guardianships—and for demonstrating and putting the spotlight on the widespread abuses that are prevalent in the system.

I would also like to congratulate the Associated Press for the public service that it performed in undertaking a massive investigation and again showing that there are widespread abuses.

Now, as you have indicated, the American Bar Association is concerned with this matter. We have been for a number of years. And growing out of that concern—this has been just mentioned in the previous testimony—we conducted a unique conference in June

of 1986 in connection with the National Judicial College in Reno, Nevada—a conference that invited people from the major metropolitan areas of the country to consider the problems of guardianship. There were some 28 participants. They included representatives of the National College of Probate Judges, some probate judges themselves; the National Association for Court Management, the Conference of State Court Administrators, the National Association of Women Judges, and the American Bar Section of Real Property, Probate and Trust Law.

The conference met for two days and they adopted a statement of recommended judicial practices, which the committee has—it is this booklet, a compendium. That statement provides for the first time some national guidance to judges in confronting the problems of the growing number of elderly who may need assistance in managing their property, their personal affairs, or both.

I am happy to advise the subcommittee that last August, in the annual meeting of the American Bar at San Francisco, these recommended practices were unanimously adopted on consent. There wasn't even an opposition of any sort. These recommended practices are now official American Bar Association policy and we want to work at the State and national level to implement them.

Guardianship, as you have mentioned, Mr. Chairman, represents a dramatic loss of fundamental civil rights of the ward and the control over property is gone. Accordingly, it should be regarded as a last resort and implemented in a manner which assures maximum autonomy to the elderly wards while providing the assistance they need.

Now you have called attention to how few States have legislative requirements. There are States that have adopted some progressive legislation in the last two decades, but much more is needed in that area.

And also, legislative advances are of value only if the judges who must administer them are attuned to the rationale for them and the special needs of the elderly wards and alleged incompetents who come before them.

This need for greater judicial education and awareness in the guardianship area was recognized by the American Bar Association as early as 1968, and it has been consistently reaffirmed since, most recently in this statement of Recommended Practices which I ask be made a part of the record of the hearings of this subcommittee.

I am happy to report that these Recommended Practices growing out of this conference address each of the subjects that have been mentioned here today.

The first area in the Recommended Practices calls for ensuring due process—the right to notice; the opportunity to be heard; the right to have counsel before one's liberty and property is taken away.

As you have said, the criminal enjoys those rights; the elderly are entitled to no less.

The second area covered by the practices deals with evidence. Too often guardianship is a rubber stamp process, rushed through with no consideration. It calls for evidence to be submitted and it emphasizes the court's responsibility to weigh and consider the evi-

dence—to look beyond the medical diagnosis and to actually determine what the situation is, because frequently medical statements are just dispositive of the case. We heard about the Alzheimer's diagnosis this morning by Mr. Porterfield. And legal judgments may give way to medical judgments, particularly if the labels are "senile" or "dementia" and the proposed ward is elderly.

The third area of the Recommended Practices deals with maximizing the autonomy of the ward. It rests on the well-recognized doctrine of the law, and particularly in the First Amendment area, of the least restrictive alternative.

Thus, we recommend that before a guardian is appointed, the court must make a finding that nothing less will do, such as a power of attorney or some kind of a trust relationship.

Second, we encourage the courts to make specific findings as to the nature of the disability and how much guardianship is needed. Guardianships can be limited, to not interfere with the person's civil rights but perhaps to care for some aspects of their property. Too little use is being made of this.

A fourth area covered is that of supervision—to ensure the effectiveness of the services. This gets at the abuses which the former public guardian was talking about today where he embezzled, and told about the loss people suffered in the system. We make two recommendations:

First, that guardians be adequately trained, that they understand what they are doing and what their responsibilities are.

Second, we recommend adequate court monitoring. We believe that there should be a guardian report; it should provide information as to the status of the ward periodically; the report should justify the continuing need for the guardianship; and finally, the court must thoroughly and routinely review these reports and take appropriate action.

To conclude, the American guardianship system is a troubled one—and all too frequently serves as a legal gateway to trample the rights of America's elders or to legitimize poor care.

The roots of the problem lie with uneven legislation, lack of judicial awareness, inadequate funds, and a failure of the public to understand what is occurring and how to prevent it. And the problem will only grow greater as America grows older.

The American Bar Association has focused on judicial reform as one key to the situation. We urge court administrators, judicial education officers, and judicial associations throughout the country to consider these Recommended Practices, and seek their adoption.

We urge State legislatures to facilitate this reform through appropriate measures. We support appropriate efforts by the Congress to help the States improve these practices. And most importantly, we urge probate and general jurisdiction judges to assess the practices within their own courtrooms, as well as their own attitudes toward the elderly who come before them.

Mr. Chairman, it has been a pleasure to appear here this morning on behalf of the American Bar Association, and we pledge our cooperation in working with you on this important subject.

Thank you.

[The prepared statement of Mr. Pickering follows:]

PREPARED STATEMENT OF JOHN H. PICKERING, CHAIRMAN, COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, AMERICAN BAR ASSOCIATION, WASHINGTON, DC

Good morning. I am John Pickering, Chairman of the American Bar Association Commission on Legal Problems of the Elderly. I am pleased to testify before this Subcommittee today on efforts to improve judicial practices concerning guardianship. The Commission is a fifteen-member interdisciplinary group created by the Association in 1979, and has focused extensively on law-related issues concerning home care, nursing homes, board and care homes, protective services, age discrimination, home equity conversion and Social Security, as well as on enhancing the delivery of legal assistance to the older population.

In June 1986, the Commission joined with the National Judicial College to sponsor a unique National Conference of the Judiciary on Guardianship Proceedings for the Elderly, funded by the Administration on Aging, U.S. Department of Health & Human Services, with supplemental monies from the Marie Walsh Sharpe Endowment. The conference brought together twenty-eight participants (of which 24 were probate and general jurisdiction judges) from 26 states with the highest population and percentage of elderly. Included were representatives from the National College of Probate Judges, the National Association for Court Management, the Conference of State Court Administrators, the National Association of Women Judges, and the ABA Section of Real Property, Probate and Trust Law.

The Conference partipants adopted a "Statement of Recommended Judicial Practices in Guardianship Proceedings for the Elderly." The statement provides for the first time some national guidance to judges in confronting the problems of the growing number of elderly who may need assistance in managing their property, personal affairs or both. In August, 1987, the ABA House of Delegates endorsed the Statement as Association policy. I ask that the full text of the ABA Recommendation and supporting report, including the Statement of Recommended Practices, be included in the hearing record.

(See appendix IV for additional material submitted by Mr. Pickering.)

Need for Judicial Education & Guidance in Guardianship

Perhaps the most striking aspect of the demographic shift toward an older population is the rapid growth of the "old old" and the frail elderly. This rapidly growing subgroup of the elderly is most likely to experience some degree of functional impairment. Thus, the need for a range of decision making alternatives becomes increasingly important. These might include voluntary money management, representative payees, trust, limited guardianship and full guardianship of the property, of the person, or both.

Guardianship represents a drastic loss of fundamental civil rights of the ward. Although there are some differences across the states, the adult who becomes a ward is essentially reduced to the legal status of a minor. Because of this significant loss of rights, and the potential for abuse, as well as its considerable costs, guardianship should be regarded as a last resort, and implemented in a manner which assures maximum autonomy to elderly wards, while still providing the assistance they need.

The primary purpose of guardianship throughout history was the protection of the property of the disabled person. The 1970's and 1980's saw a heightened interest in the personal aspects of guardianship within the social service and legal communities; as well as a significant body of guardianship literature. As guardianship expertise grew, and as the growth in the elderly and disabled population continued, state guardianship laws began to change. Today, a significant number of statutes provide for representation of the proposed ward by counsel, separation of guardianship of the property and of the person, some form of limited guardianship, mechanisms for court investigation, and periodic court review of guardian reports. In 1982, the National Conference of Commissioners on Uniform State Laws promulgated a Uniform Guardianship and Protective Proceedings Act as Amendments to Article V of the Uniform Probate Code, incorporating many of these changes.

However, legislative advances are of value only if judges are attuned to the rationale for these advances and the special

needs of elderly wards and alleged incompetents who come before them. Judges who must decide the anguishing question of incompetency and need for guardianship confront a formidable task, often with tremendous caseloads and inadequate resources. The need for greater judicial education and awareness in the guardianship area was recognized as early as 1968, and reaffirmed by a 1979 ABA study which proposed "an educational campaign, focused on the bench and bar" regarding guardianship; as well, as by a 1981 White House Conference on Aging recommendation for judicial education in issues affecting the elderly generally. The 1986 ABA Conference provided an initial response to this crying need, and the ABA now seeks to extend its results to the state and local level.

Statement of Recommended Judical Practices

The Recommended Practices are divided into four related areas of judical involvement:

1. Procedure: ensuring due process protections. This section reflects the theory that because guardianship can result in massive curtailments of personal rights and civil liberties, the process should be adversarial in nature and should assure constitutional due process rights.

Thus, the Recommended Practices provide for a timely, understandable notice clearly indicating the possible adverse results and the respondent's rights during the process. They emphasize the importance of respondent's presence at the hearing, and the court's role in encouraging presence and making it as meaningful as possible for frail elderly who may be confused, intimidated, or experiencing sensory loss.

In addition, the Recommended Practices support the appointment of counsel for alleged incompetents who would otherwise be unrepresented; and provide that counsel act "as advocate" and "represent the respondent in accordance with the [state] rules of professional conduct."

2. Evidence: applying legal standards to medical/social information. This section stems from the tenet that judicial guardianship determinations should be based on assessment of the alleged incompetent's condition, limitations, and capacity

to make decisions and maintain an independent life. It stresses the court's responsibility to look beyond the medical diagnosis -- and to look beyond the possible "advanced age" of the respondent -- to his/her actual functional abilities. This is significant because frequently medical statements are dispositive of the case, and legal judgments may give way to the medical labels -- particularly if the labels are "senile" or "dementia" and the proposed ward is elderly. The Recommended Practices place the "ultimate responsibility" for the determination of incompetency squarely on the judge, and indicate that the medical diagnosis should be balanced with information about the behavior of the proposed ward.

To accomplish this, the Recommended Practices provide, the judge should have trained investigative resources available to assist, and these resources should be "familiar with the problems of the elderly."

In addition, the Recommended Practices highlight the need for judicial education about the aging process. Our society is pervaded by "ageism" -- and judges are as much affected by this ageism as the rest of the society. The danger is that it may govern their thinking about elderly alleged incompetents and their decisions about the need for guardianship. Thus, judges must be made aware of the myths and sterotypes of aging and encouraged to examine their own attitudes.

3. Court order: Maximizing autonomy of the ward. This section rests on the well-recognized doctrine of the "least restrictive alternative," which suggests two important recommended judicial practices for guardianship. First, before appointing a guardian, a court must make a finding that no less restrictive alternative exists. Specific legal interventions which may serve as alternatives to guardianship include power of attorney (where the alleged incompetent has the capacity to execute such a document), appointment of a representative payee, and creation of a trust. However, legal intervention may be unnecessary if sufficient social services exist within the community to enable the alleged incompetent to remain independent, and if he/she voluntarily accepts these services. Consultation with the state and area agency on aging under the Older Americans Act could assist the court in identifying such resources.

Second, the Recommended Practices encourage courts to consider making specific findings as to the ward's disabilities, and granting to the guardian only those powers necessary, through the concept of "limited guardianship." This concept has been included in the Uniform Probate Code, model guardianship statutes and a number of state statutes. In states that do not make statutory provision for limited guardianship, probate courts may well have inherent power to create limited guardianship because of their equitable nature.

The conference recommendation to use limited guardianship where appropriate is significant because it departs from the common judicial practice of routinely granting plenary guardianships. Indeed, a number of studies -- most recently a 1986 study examining judicial guardianship practices in three Illinois counties -- have suggested disturbingly low usage of limited guardianship.

4. Supervision: ensuring the effectiveness of guardianship services. This section seeks to assure that once a guardian is appointed, the surrogate decisions made and the fiduciary services provided will best meet the needs, yet respect the rights, of the ward. Training of guardians should include information about the aging process, the aging network under the Older Americans Act, and the existence of relevant community resources.

Also, the essential is adequate court monitoring. The Recommended Practices encourage the court to establish and follow a procedure for complete and systematic review. They make three important points about such judicial review. First, a guardian report should include information as to the status and well-being of the ward. Second, the report should justify the continuing need for the guardianship, in accordance with the principle of the least restrictive alternative. Third, the court must thoroughly and routinely review these reports and take appropriate action. For this to occur on a regular basis, "a system of calendaring" is needed, buttressed by sanctions for failure of guardians to file timely reports, and strict enforcement of those sanctions.

Conclusion: Imperative for Judicial Reform

The American guardianship system is a troubled one -- and all too frequently serves as legal gateway to trample the rights of America's elders or to legitimize poor care. The roots of the problem lie with uneven legislation, lack of judicial awareness, inadequate funds -- and a failure of the public to understand what is occurring and how to prevent it through use of legal tools to preserve autonomy. And the problem will only be accentuated as America ages.

The American Bar Association Commission on Legal Problems of the Elderly has focused on judicial reform as one key. Courts in the coming decade must evaluate how they will accommodate the pronounced demographic shift to meet the greatly increased needs of older perons as alleged in competents, plaintiffs in civil suits, subjects of administrative proceedings, probate beneficiaries, jurors, victims, witnesses, and court volunteers. Specifically, the Commission urges court administrators, judicial education officers, and judicial associations throughout the country to consider the Recommended Practices adopted by the American Bar Association. It urges the state legislatures to facilitate this reform through appropriate measures. It supports appropriate efforts by Congress to help the states improve judicial practices concerning guardianship. Most importantly, it urges probate and general jurisdiction judges to assess practices within their courtrooms -- as well as their own attitudes toward the elderly who come before them.

Mr. PEPPER. Mr. Pickering, we are delighted to have you here. With your eminence at the bar and in the American Bar Association, your recommendations and your views are, of course, extremely important to the Congress and the country.

Now, to summarize, would you think that we should enact some legislation at the congressional level in this area?

Mr. PICKERING. We have not focused, because the problem has been so acute at the State level—that's where we began with this conference.

But as you have indicated, you are considering, for example, nursing home standards. I am happy to say, and as you know, our Commission on the Legal Problems of the Elderly came up with some of those recommendations, and in connection with Federal financing, goes some Federal responsibility and supervision. We are not entirely sure what that should be. We haven't focused on Federal legislation, but this is something we can certainly look at as to what kind of, say, minimal national standards there should be.

You are quite right in talking about the fact that we are dual citizens and that some of our basic liberties are secured in the Federal Constitution. And there is an area in here that really, I think, merits some looking at.

A lot of the details and so on must be done at the local level. Practices, necessarily, vary, say, between Maine and southern California—there are regional and other differences that have to be taken into account.

One of the great problems, of course, is the need for personnel and funding. A lot of the problems are simply because most of the judges are not uncaring people but they are overwhelmed—particularly in some metropolitan jurisdictions. They just have too much work and too little staff to do anything but give a lick and a promise; and that contributes, unfortunately, to the problem.

So there are areas that the Federal Government can certainly think about and look into.

Mr. PEPPER. Would it be feasible for Congress to consider something like a uniform guardianship law or something like that? We have several uniform laws that the Congress has enacted like——

Mr. PICKERING. The National Commissioners on Uniform State Laws, of course, come up with proposals from time to time. And here I would defer, I think, to someone whose experience is more than mine. There are some fairly good provisions in the Uniform Probate Code but they aren't always carried out.

I think those would have to be sort of minimal standards, I think, that States would be free to exceed or to vary, depending on their particular needs.

But I think something along those lines could be a possibility. At least try to bring up standards in the same way that a lot of the welfare programs have tried to achieve a certain amount of national uniformity without being absolutely all in the same mold.

Mr. PEPPER. As you say, it should obviously be a minimum standard that we would lay down. One of them might be to recommend that the appointment of the guardian be for a limited duration, as was suggested here by Ms. Merrick. That would give an opportunity for an automatic reevaluation after a reasonable period of time.

Furthermore, we should put emphasis on the courts making an actual finding upon facts that would justify that finding and the record reflects that there was a need for the appointment, and that a guardian should be appointed for that individual. And that would require, in the case of alleged mental disability, proper medical testimony and proper evidence in the record, and the same with physical disability and the like.

We could also easily, it would seem to me, include the requirement that there be an attorney present, as you said, to represent the individual, and that the individual have an opportunity to be present at the hearing if that person is physically able to do so.

I think it would have an enormously helpful effect if we could lay down a national code of minimum requirements in that critical area.

Mr. Pickering, has the American Bar Association issued general guidelines in these areas?

Mr. PICKERING. These practices, which are now the official position of the American Bar Association, have been widely distributed to probate judges throughout the country. We are working at the State level and the probate and general jurisdiction section of the Judicial Administration Division of the American Bar Association is working on that. This is, again, at the State level.

As you, I think, know, I have a little vacation home up on Cape Cod. One of the participants at our conference was Judge Harvey of Barnstable County in Massachusetts, which covers Cape Cod, Martha's Vineyard, and Nantucket Island. Two probate judges sit there. The statewide population for people over 65, the statewide average in Massachuetts is 13 percent. Cape Cod's average is 30 percent.

I met with the judge and also with the elder care organization there. They are doing what they can, but it is a job that needs funding, and it needs public awareness. The AP series is a very good thing in bringing that kind of knowledge home.

But in these days of government cutbacks, budgetary problems, and so on, it is not something that is going to be solved overnight—but something that we have to work on.

Mr. PEPPER. You say we are in a period now where we have a rapidly growing elderly population percentagewise and in numbers in our country.

When I was born in 1900, only 5 percent of the people were over 65 years of age. Now 11 percent, approximately, of the people are over 65 years of age. And in less than 50 years, it is estimated that almost 20 percent of our population will be over 65 years of age.

And the group within the elderly that is most rapidly increasing, percentagewise, are those over 85. So it is a problem of serious concern to our country. We have a burgeoning elderly population.

The elderly are more likely to fall ill than younger people. They generally require about three times as much medical care as those in other age groups. We have an ever-increasing number of our people who are susceptible to abuse—physical abuse, financial abuse and so on—because they are frail and depend upon others for their care.

Our committee has also held numerous hearings about the financial frauds that are perpetrated against the elderly. They are a

group that the crooked play upon particularly, because they are vulnerable.

The other kind of abuse is in our institutions, such as nursing homes. We have had a number of hearings about wretched conditions, abomindable conditions in nursing homes.

My sister was in a hospital in a certain county in Florida, and one day she was out of the room which she shared with a lady. When she returned the lady, her roommate, was sitting on the bed crying. My sister said, what is the matter?

She said, my daughter was just here and she said she can no longer keep me in her home. She is going to put me in a nursing home, and I am trying to get the doctor to agree to get me out.

A lot of times, people are taken out of a peaceful environment—even their own homes—and put in nursing homes against their will.

I know my dear mother said to me many times, son, don't ever let them put me in one of those nursing homes. She had a home of her own and she lived there until the end of her life. She had her own neighbors, her own flowers, her own accustomed accommodations and the like.

I want to talk to Mr. Rodino, who the Chairman of the Judiciary Committee, about protecting the rights of the elderly. We may invite you for a conference on it, Mr. Pickering, to see what would be appropriate for the government to do to be helpful. I suspect we can help the States to lay down at least minimum requirements for guardianship, as we are trying to do now in nursing homes.

For example, right here in Washington not long ago, we had evidence of a lady who was 90 years old, and she got so she couldn't eat. They didn't have a trained nurse in that nursing home, so some people on the staff just crammed food down that lady's throat—and she choked to death.

Now, one of the minimum requirements that we are trying to get established in nursing homes is that at least one trained nurse be on duty at all times in that home. Now, if that had been a trained nurse there, she would have known about this 90-year-old patient who needed to eat, and she would have found some more medically acceptable way of putting nourishment into the lady's body rather than physically cramming it down her throat.

So this whole area is of growing concern to the Federal Government because Federal money is involved in many aspects of this problem. It involves constitutional rights, civil rights, and the like.

So the Federal Government is not trying to just inject itself where there is no need for it into an area where nothing needs to be done. We are just concerned because these are citizens of America too. We want to be helpful to the States, but we want them to take some interest in the matter themselves and to protect people's due process rights in this critical area.

We are very grateful to you, Mr. Pickering, for taking your valuable time and being here with us today. No doubt, we will be in further contact with you about this.

Mr. PICKERING. I look forward to that very much, Mr. Chairman.

Mr. PEPPER. Thank you very much.

Now we have Mrs. Nancy Trease, Esquire, Legal Aid Service of Broward County, Florida. We would be pleased to hear from you, Ms. Trease.

STATEMENT OF NANCY A. TREASE

Ms. TREASE. Good morning, Mr. Chairman. It is very gratifying for me to hear all of this discussion and this attention paid to the problem of guardianship because as I said in my statement, I have worked for Legal Services for 10 years and in that work I deal with people who are——

Mr. PEPPER. By the way, without objection, all of the written statements of the witnesses will be included in full in the record today.

Thank you.

Ms. TREASE. Thank you.

The people that I work with are people who have been victimized; people who have serious problems with the legal system; people whose civil rights have been invaded. But of all the people that I have worked with, the group that I have had the most difficulty representing has been people who have been determined to be incompetent. They are literally disenfranchised. They have no voice and no one seems very interested in hearing what they have to say. They have no legal status to go to court for me to represent them. It is a very difficult and frustrating thing to try to represent those people. And if I serve any function on this very distinguished panel, I think it might be to try to express to you kind of the view from the field, or the immediate problems of trying to work within the legal system to represent people who are allegedly incompetent.

I have heard a lot today about various abuses of civil rights in the guardianship process. The Florida guardianship law is a very old law, relatively speaking. Most States have rewritten their laws since Florida has, and that law has a lot of problems. There is a position paper which has been circulated for a number of years listing the civil rights violations which are inherent in the Florida guardianship law.

I have been a part of the Florida Bar's effort to rewrite the guardianship law, trying to recognize that this isn't an either/or kind of a situation. It isn't that people all of a sudden wake up one day and are a nullity as people, and that it is sort of a black or white kind of problem. But trying to recognize that people as they grow older, or for some other reason, may lose certain specific abilities; and that does happen, and we recognize that.

But that, for example, a person that becomes forgetful and, say, is not eating—and malnutrition, anemia, a lot of physical things can mimic senility very closely; but it is very important in that circumstance to find out what is wrong. Does the person need nutrition—like Ms. Monoff was talking about how she gets meals-on-wheels. Should we simply get that person access to better meals? Are they very, very depressed? Has something very depressing happened—as several of your witnesses said this morning—so that they need psychiatric treatment, or mental health treatment to try to remedy that problem? Or it may be Alzheimer's. But, you know,

that is an area where there is a lot of research going on, and with the proper treatment it could really make a difference. But if you just label that person incompetent, senile, they have organic brain syndrome, which is an easy thing to say when you see those symptoms, and sort of lock them away from any further access to improvement—you do a terrible, terrible thing.

What we have been trying to do in Florida is to reform the law so that it would recognize what people's needs are and then try to address those needs, and not take away any rights that are not absolutely necessary for the protection of that person. For example, a common reason for people to be declared incompetent in Florida is that they can easily be victimized. I have seen this on many, many files—that their mental state is such that they are subject to being taken advantage of. But there are remedies for that which do not require a total guardianship. We can protect that person's assets, if that is a true statement, without taking away from them some of the rights that you have mentioned: the right to live in their own home; the right to make other decisions about their life; a lot of very fundamental decisions which are critical to that person as an individual.

We have not been able to get changes in the Florida guardianship law passed. And there are forces within the Florida Bar Association who fight us, and they have been so open and so clear as to state that they feel that our proposed statute does too much to focus on the civil rights of alleged incompetents. We make it too difficult to obtain a guardianship—for that reason they oppose us.

I would like to make clear to you, Mr. Chairman, that we are talking here about business—big business—not just in the case of an estate like Mr. Merrick's where there is a large amount of money, but in the State of Florida there are a lot of people who make a living being guardians. And some of those people are very good people, who do this out of the best of motives. But these people are in an almost inherent conflict position because they are doing work for someone and getting paid out of that person's estate. So in a sense, they determine what needs to be done and they determine how much pay they are going to get for it.

I have seen situations where someone is declared incompetent and they continue to live in their own home, and the only difference is that instead of getting a free bus ride to do their grocery shopping—which they were perfectly capable of taking advantage of—they now have a guardian that comes in a taxi and charges them $30 an hour to take them grocery shopping. That is not right.

But what I want to emphasize is this is—when you talk about guardianship reform, there are forces arrayed against you, and they are not insignificant. There are a lot of people who have a vested interest in having this system run smoothly and there are a lot of people who make a lot of money out of the process of declaring people incompetent—not just people who are victimizing family members, although that happens much more often than we would like to see.

The second thing I want to address, and this is interesting because I have heard you say several times today that it is important for the alleged incompetent to have an attorney, and several people have mentioned attorneys. But the three people who testified who

have been under guardianship, all had an attorney. One of the big problems in their case was, their attorney signed their rights away. Their attorney did that having reached a decision that that was the right thing to do.

This attitude by attorneys, which is so common, is a greater deprivation of rights in my mind than for someone not to have any attorney at all.

In Broward County where Ms. Van Etten went through the terrible experience that she did, that situation is not at all unusual, and here is what happens: Someone files a petition—it may well be a State agency, one of the State agencies in Broward frequently files these petitions. The day that petition is filed an attorney is appointed. The attorney goes out to represent this person. The attorney goes out and interviews the alleged incompetent before the alleged incompetent even has the petition. So they don't even know what is going on.

The attorney then files a report with the court and says, I agree, this person is incompetent. They don't need a hearing, sign the papers, it is all over.

Now, there are some very cursory medical opinions, but there are some problems with the way the medical opinions are done. They are not a sufficient protection as the many cases I have seen where there have been mistakes will testify.

But what I want to get at here is you have the attorney playing a role, which in any other circumstance, an attorney would never ever do. For example, if I were representing a criminal, I would never say—I could not say—to the court, well, I have decided that my client is guilty, and that he should go to jail. And it would be best for everybody concerned if he went to jail.

I can't even say, I have decided it would be best for my client to go to a mental institution. I can't make those decisions. My client decides what to do.

He says, no, I want you to fight for me to be declared innocent. And I must do that. That is my ethical obligation.

But in representing an alleged incompetent, attorneys seem to feel very comfortable making this decision that they know what is best for that person. It is very rare to find attorneys who actually go in and fight for what the alleged incompetent says that they want.

When I first started doing this work, I had some problems myself trying to figure out what my responsibility was. My first client was a wealthy gentleman; he had been an entertainer. On his walls in the nursing home were posters of him appearing in Miami Beach nightclubs. He had a lot of money. He had had a stroke, he was diabetic, and he drank too much, according to the people in the nursing home—and he had been declared incompetent.

In my opinion he was not mentally incompetent. He did, however, have a tendency to do things that were not very good for him: drink, for example, when he is diabetic.

When he first asked me to get him out from under this guardianship, I really went through a great deal of self-questioning. And I said, can I release this man into society when he may kill himself, or hurt himself? I did a lot of reading, and a lot of thinking, and a lot of deciding about what I should do. I decided that Florida has

laws to deal with alcoholism. It has laws to deal with people that are suicidal and that are doing damage to themselves, and that guardianship is not an appropriate way to deal with people that have those kinds of problems.

I don't think guardianship is an appropriate solution for us to decide what is right for people.

And ever since then, I have seen my role as an attorney to try to figure out what my client wants and to do the most that I can for that person.

But, Mr. Pepper, I am a real renegade in that respect. And when you talk about appointing counsel, I would suggest to you that we need to give guidelines to attorneys, to suggest to them that this is just like any other case; and that when they come in to represent someone, there is only one person who is going to advocate for the incompetent, and that is his or her attorney.

There are plenty of people out there who are happy to decide what is best for that person. Social workers and managers of nursing homes—all those people would love to make "best for" decisions. But that person needs an advocate to do what that person wants done if you are going to get a fair result in the case.

The final thing I wanted to mention is that I have been trying to litigate in this area for years, and one of the real problems that you have trying to litigate issues concerning guardianship is that you are confined to the State court system.

You mentioned that there is a duality in our legal system. We have a Federal system and a State system, and they serve different functions, normally, in administering our legal system.

The guardianship process—if you look at the Federal case law, there is almost no Federal case law on the issue of guardianship. There is none because guardianship has always been under the exclusive purview of the State courts. And under the Younger Absention Doctrine, because the State has an ongoing interest in that proceeding—because guardianship in theory is a continuing process where the State continues to check on the guardian—the Federal courts are deprived of the ability to intervene.

I have encountered a lot of frustration trying to litigate for people when I can't go into the Federal courts and simply say as I would like to say: "Under the Fourteenth Amendment, the State of Florida has deprived this person of their civil rights; many of them, here they are, numbered 1 through 37, and I would like you, the Federal court, to look at the Florida guardianship system and tell them how it must be run in order to be constitutional."

I have made the decision as a lawyer that that cannot be done, and that there is no case law in that area to sustain me if I wanted to do that.

I would really like to see a legislative override of the Younger doctrine in that respect because I think that this kind of piecemeal approach to guardianship is never going to result in the kind of reforms that Mr. Pickering mentioned, and which are so important if we are not going to deprive people of their constitutional rights.

You need someone to take kind of a global look at it, because in trying to litigate—the problem that happened to Marguerite Van Etten, I took that up to our State Court of Appeals. It was very hard for me to find someone that could litigate that issue because

they don't serve someone like Ms. Van Etten with a copy of the order declaring them incompetent, they don't even know what's happened. Once the attorney has waived the hearing, that is the end of that.

So someone has to find out what has happened within 30 days in order to even be able to appeal at all, even within the State system.

But I finally found someone that wanted to appeal and got it up to the Fourth DCA, and briefed it at great length, and got down a three sentence opinion, saying, no, the attorney cannot waive the hearing for the alleged incompetent.

So do you know what they are doing now in Broward County? Now the attorney appears and he waives his client's presence at the hearing. So now they have the hearing in front of the judge—they hold about 15 of them in five minutes because none of the clients appear. And what happened to Marguerite could happen again. That is the thing that I most want to emphasize, is that you cannot have oversight over the State court systems under the system as it exists.

Thank you very much. I wish you the best of luck in working in this area which I think has been sorely neglected for many years. Thank you very much.

[The prepared statement of Ms. Trease follows:]

PREPARED STATEMENT OF NANCY A. TREASE, ESQUIRE, LEGAL AID SERVICE, BROWARD COUNTY, FL

I have been a Legal Services attorney for ten years. I now work for Legal Aid Service of Broward County, Inc., which has offices in Ft. Lauderdale and Pompano Beach, Florida. This is, of course, an area of the country which has a disproportionately large population of elderly people. In this job I have had occasion to investigate dozens of complaints about guardians, wards, and incompetency proceedings. I have seen many abuses of the civil rights of persons who become involved in the guardianship procedure. As a result I have become active in working with Florida Bar committees addressing guardianship issues, while litigating guardianship civil rights issues though the state court system. Of the many issues that have come up during this work, I will address only three. The first concerns problems with the Florida statute which may have some relevance on a national level. The second is the role of attorneys and advocates for persons who are alleged to be incapacitated. The last issue concerns the role of the courts in preventing abuses of the guardianship system.

The fundamental premise of the Florida Guardianship Law is that a person may become completely "incompetent" for a wide variety of reasons, so as to make it appropriate to deprive that person of all their legal rights and delegate the exercise of those rights to a guardian appointed by the court. This concept is dangerous, and is based upon an assumption which most medical authorities do not endorse: that a person can be determined to be competent in a black-or-white, either/or sort of way. In the state of Florida this reasoning results in medical opinions expressed in checklist fashion, upon a form which allows very little space for expressing the basis for the expert's opinion. The limited reporting of expert opinion leads to very cursory medical examination of persons alleged to be incompetent; as a result, acute medical situations are misdiagnosed as chronic, as happened in the case of Marguerite Van Etten. I had another client who was adjudged incompetent while in a brain fever, and he remained legally incompetent for eight years because of the obstacles the legal system placed in his path when he sought restoration. A statutory scheme which more accurately reflected the current state of knowledge about the process of aging would recognize that the loss of specific abilities or skills may occur along a continuum, and that it is appropriate (and constitutional) for the legal system to impose substitute decision-making only where this is clearly necessary.

According to experts who have testified for me, "organic brain syndrome" should be a diagnosis of last resort, arrived at only when all other explanations for the dysfunction have been exhausted. One reason is that a misdiagnosis of permanent, untreatable OBS may well result in a failure to treat the actual temporary condition. A very common example is severe mental illness which produces dire symptoms but which might be responsive to treatment, if the sufferer had not been more loosely categorized as "incompetent."

The "all-or-nothing" approach to guardianship reflected in the Florida Guardianship Law gives the guardian a terrifying range of powers under Florida law. Many persons appointed guardian approach their role with an appropriate sense of humility and restraint; all too often, however, and particularly in cases of "professional" guardians who make a living looking after persons with diminished capacity and paying themselves out of the ward's estate, the guardian exercises his powers with arrogance and much too much confidence in his ability to determine what's "best" for his ward. An example of such an assumption of power was a case where the guardian prevented his ward, by changing her residence, from attending the church where she had been a member for several years before she was declared incompetent. The guardian saw church members as troublemakers, largely, I believe, because they brought this person to see me for a consultation about her legal rights. In another case a woman was deprived of the

companionship of her husband of twelve years, although the state agency involved and my psychiatric expert both felt that the relationship was of great importance to her. The guardian and the guardian's attorney had determined, although they never raised this issue in court in any way, that the relationship was abusive and a sham. They therefore institutionalized the woman and denied the husband access. That case is on appeal at this moment, but the husband left the state in frustration after the family home was lost and may never reappear.

The second problem I would like to address is the role of advocates for the allegedly incapacitated person. There is a natural tendency on the part of attorneys representing alleged incompetents to assume an ad litem role, meaning that they make decisions for their clients believing that they "don't know what's best for them." The classic instance is the case where concerned persons in the environment of the alleged incompetent have determined that it is no longer safe for that person to live alone, but the elderly person is very much attached to their independence and is unwilling to accept an institutional placement. It is not normally the attorney's role to evaluate the wisdom of his client's wishes, but just to advocate as best he or she can to achieve the result wanted by the client.

Under these circumstances my position has always been, and continues to be, that the attorney representing the elderly person has an obligation to assert that person's expressed wishes to the extent of the attorney's abilities. Certainly the attorney's duties includes the obligation to advise his or her client of the likelihood of succeeding in asserting any of their desires. There is a good reason for the attorney to express his or her client's wishes as best he can: no one else in the courtroom will do so, and an exposition of the arguments on all sides gives the best chance of an informed decision.

Finally I would like to mention a problem which has had a profound impact on law for the disabled, including the mentally incapacitated. This is the fact that various forms of the "abstention doctrine" have prevented the federal courts from adjudicating such issues in recent years. Guardianship issues, for example, are impossible to litigate in federal court because of the Younger doctrine, which prevents a federal court from acting where there is an ongoing state proceeding. Guardianship is, by its very nature, a continuing proceeding. The state court in such cases, in theory at least, maintains a watch over the guardian, who must file reports with the court concerning the status of his ward.

One important function served by the federal courts, however, is to enforce the Fourteenth Amendment to prevent state systems from depriving citizens of their civil rights. The testimony of Marguerite Van Etten, for example, which was presented this morning, indicates to me that Broward County deprived her of a number of very basic civil rights. When a petition was filed alleging that she was incompetent, an attorney was appointed to represent her in those proceedings. That attorney filed a report with the court waiving Mrs. Van Etten's right to a hearing. She was not served with a copy of the order adjudging her incompetent and, in fact, it was several months before she discovered that she had been ruled incompetent. This was standard procedure for almost all the guardianship cases decided in Broward County.

After several years of systematic work I was able to present this issue, the waiver of hearing, to the state court of appeal. It was very difficult to accomplish this. Because the order adjudging incompetency is not served upon the subject of the proceeding, it was hard to find someone who had the capacity to understand the problem and who discovered the situation within the thirty days time for appeal. The court of appeal did rule that the attorney for the alleged incompetent cannot waive the hearing. As is typical for a state appeals court, however, the ruling was extremely limited. After the appellate decision, the court below now permits the attorneys to appear and waive their clients' right

to appear at the hearing. The result is that judges in Broward County are still making a decision which affects every aspect of a person's life without ever laying eyes upon that person. If Marguerite Van Etten were to be incapacitated again she might well again be declared incompetent without ever seeing the judge who made that decision. The state appellate system does not afford sufficient protection to the incapacitated elderly, and it is unfair that they are so completely deprived of access to the federal courts.

In summary, I believe that statutory reform is desperately needed to protect the rights of persons alleged to be incompetent. Changes are also needed in the attitude of many attorneys working with the mentally impaired. Finally, a statutory override of the abstention doctrine in this area is needed, to permit the federal courts to take a long, careful, and considered look state systems for adjudication of legal incompetency, and to monitor the protection those systems afford to the civil rights of alleged incompetents.

Mr. PEPPER. Thank you very much.

You have given us a very animated and very interesting statement from your experience as a Legal Aid attorney.

By the way, the other day a prominent lady here in Washington came to see me in my office in Miami—it was regarding a guardianship matter. She had been a guardian and the judge had summarily removed her; she said it was because she came back to Washington for a couple of weeks.

At her request I ventured to call up the judge—not to interfere with his decision but just to ask him what happened. In the course of the conversation, he mentioned that he had removed her because he didn't think she was competent, and he appointed the county guardian people instead. Apparently there is a county agency that has to do with the guardianship.

Is that true in Broward County?

Ms. TREASE. We have a new statute we are very excited about, Mr. Pepper, it is the Public Guardianship statute which the Disability Law Committee—of which I am a member—got through a couple of years ago. But it is only funded in two Circuits, one of which is Broward; and it is very, very underfunded. The public guardian at the moment can only handle 40 wards. That public guardian only deals with people who are indigent and who have no family members to look out for them. Believe me, we think it is an enormous advance. We are very excited about it. We would like to see that program extended. But, yes, that has been a very exciting appointment.

Mr. PEPPER. But there are certain people that the courts generally turn to in these cases who sort of get to be professional guardians?

Ms. TREASE. Yes, sir. There is a list of attorneys, there is a list of lawyers—I mean a list of lawyers, a list of doctors, and a list of guardians. They are short lists, and the court just rotates through them, basically.

I don't know but about six or eight lawyers in Broward County that do guardianship work. The doctors—there are only about five or six names that I have seen, and they all look the same—the opinions.

And the guardians, I don't know how many of them there are but they are essentially professional people who——

Mr. PEPPER. So at the present time, there is nobody to look into or supervise this whole guardianship operation?

Ms. TREASE. No, sir.

Mr. PEPPER. Other than the county judge?

Ms. TREASE. Yes, and even there—you know, as Mr. Pickering said, the judges are overworked and I don't think they see this as really necessarily being a real high priority because these are not people that are out beating the stumps, you know, drumming up votes for the judges either. This is a real voiceless population.

We had a case at Legal Aid, one of the first ones I ever saw, where the guardian had not filed a report in many years, and some relative appeared from somewhere and said, this is outrageous. And my boss, the Director at Legal Aid, said, well, let's just send it over to the judge's office; surely some action will be taken. Much to our surprise, you know, no action was taken at all.

They do not go out looking for the guardian saying, are you doing your duty?

Mr. PEPPER. You know, situated as we are in Florida where so many elderly move down there from other States, sometimes they leave their families up in another State. Some local person, a neighbor, or some ambitious or avaricious person could simply go and get himself appointed guardian in the absence of the relatives knowing anything about it, and could have a guardianship in force before the relatives in some other State knew anything about the matter.

Ms. TREASE. It happens all the time, Mr. Pepper.

One thing that amazes me about the lack of interest that I have seen for this problem, is that it can happen to almost anyone. It probably couldn't happen to you but it might well happen to me.

I have seen it happen to people who have had power.

I have seen it happen to people who had money.

I have seen it happen to people who had kids; who have, unfortunately, not turned out to be, I guess, what they had hoped.

There is no insurance against having what these people this morning described, which is not unusual. I will tell you, I don't want to grow old in Broward County until this problem is resolved. I am sincerely and genuinely afraid of the power that we take upon ourselves—as Mr. Porterfield said, to live somebody's life for them. It is terrifying.

Mr. PEPPER. Have you taken this matter up with the Florida Bar Association?

Ms. TREASE. Yes, I am very active in the Florida Bar Disability Law Committee, the Subcommittee on Guardianship. We have proposed remedial legislation which provides, by the way, for a report every year, and for monitoring and follow-up.

Mr. PEPPER. You have proposed it?

Ms. TREASE. Yes, we have. We have been trying to get it through for years.

Mr. PEPPER. The legislature hasn't adopted it yet?

Ms. TREASE. Opposed to us is a bigger segment of the Bar that does the real property and probate work that says that we want to make it too difficult and we want to focus too much on civil rights.

We haven't even been able to get the Bar as a whole to act upon it. I don't see any reasonable prospect of that happening——

Mr. PEPPER. Who is comparable to Mr. Pickering of the American Bar Association in our State Bar? Do you happen to know who it is?

Ms. TREASE. The ABA, of course, is a voluntary Association. I am speaking here about the organized bar which——

Mr. PEPPER. Do you happen to know who it is, Mr. Pickering?

Mr. PICKERING. Mr. Chairman, I don't know the current president of the Florida Bar. The most recent president that I know and have worked with is Mr. Emanuel.

I would like to make a couple of comments, because I agree with everything Ms. Trease said. There are in any system—it is not only lawyers, it is court administrators, it is professional guardians, and so on, who do have a certain amount of a vested interest. That is why I think it is so good and why I emphasized that these Recommended Practices were passed on the consent calendar at the

American Bar Association. No one spoke against them. They were supported by the Section on Real Property, Probate and Trust Law.

I would hope that with this action that the Florida Bar might overcome some of that opposition. I don't underestimate it at all, but I would hope—and we would certainly be happy to do what we can.

Mr. PEPPER. What would be the appropriate committee of the Florida Bar that would handle this?

Mr. PICKERING. I don't think they have in the Florida Bar a Commission on Legal Problems of the Elderly—at least I am not familiar with one.

Mr. PEPPER. If we don't, I am going to try to get them to establish one.

Mr. PICKERING. I will be happy, through our national office, to check as to what is available and what appropriate committees of the Florida Bar we ought to call these recommendations to the attention of.

Mr. PEPPER. If they don't have a committee like yours, we will see if we can't get them to establish one and then confer with you about how you might work together in this matter.

Mr. PICKERING. The second thing I would like to say is also to agree that it does no good to have an attorney, who is, just again, a rubber stamp, as we have heard here.

Mr. PEPPER. Yes, that is right.

Mr. PICKERING. We had a symposium—a panel discussion at the American Bar meeting in San Francisco, which I moderated—on what is the lawyer's role in dealing with the elderly and the incompetent.

Is it to be the advocate and to try to carry out the person's wishes or is to be sort of a judge and decide what is in the best interest?

It is a difficult issue, but we are moving on that. These guidelines make clear that the attorney is supposed to represent the individual, not just to be an ombudsman to make up his own judgment.

I did not mean in my statement in any way to minimize the problems that exist out there, but they are problems that our Commission, in particular, and the American Bar Association in general, are concerned about, and want to do something both with the role of the lawyer and the role of others in the system.

Mr. PEPPER. Ms. Trease, has the Legal Aid Service agency been called upon to represent any people for whom guardianships are proposed?

Ms. TREASE. I did some of that work. I don't believe right at the moment we really are doing it. I did some of that work because I developed a personal interest in it for a number of years. I have actually done a fair amount of it. I am not sure that we are actually doing any at the moment.

Mr. PEPPER. What program is it, Mr. Pickering, where we provided legal services at low cost to people who could not normally get them?

Mr. PICKERING. The Legal Services Corporation—but, as you know, that is something which this administration, the current administration, has tried to——

Mr. PEPPER. That's right.

Mr. PICKERING [continuing]. Extinguish year after year, but the American Bar Association and the Congress has made sure that it has not been.

Mr. PEPPER. I know that.

Mr. PICKERING. But it is not appropriately funded.

Mr. PEPPER. Even if we had the Legal Services Corporation, or this organization in Florida we are talking about, to go in and represent them, that would be something.

Ms. TREASE. Let me make clear that I am Legal Services. Legal Aid Service of Broward County, Inc. is your local Legal Services grantee for Broward County. I have worked for the Legal Services Corporation for one or the other of its grantees for the last 10 years—first in Miami, and then in Sarasota, and then in Ft. Lauderdale.

The other thing I wanted to say, Mr. Pepper, is you asked for the name—I guess you asked me for the name of the president of the Florida Bar, and that is Ray Ferraro from Ft. Lauderdale, from my local town. I hope that he is going to take an interest in this problem.

The committee of the Florida Bar is the Disabled Law Committee, which has a committee that has drafted remedial legislation which has attracted a lot of attention from a lot of groups.

I think the thinking now is that we may have to work outside the Florida Bar, however, because of the political opposition that we have encountered. I think that that is the current thinking right now in terms of guardianship reform.

Mr. PEPPER. We will be back in touch with you. I expect to get in touch with the Florida Bar about it and see if we can't be helpful.

Ms. TREASE. Thank you.

Mr. PEPPER. Thank you very much, Ms. Trease.

Now the final witness is John Regan, Professor of Law at Hofstra Law School. We are glad to hear from you, Professor.

STATEMENT OF JOHN J. REGAN

Mr. REGAN. Thank you, Mr. Chairman.

I appreciate the opportunity to share some thoughts with you and other members of the committee and staff on this subject. I am John Regan, Professor of Law at Hofstra University School of Law in Hempstead, New York.

We are dealing today with what I think is one of the last of the invisible minorities in our society—the elderly whose basic right of self-determination has been taken away by government and given to somebody else.

I was asked to sketch a moment or two of legal history to show how we got where we are, to assess the reality of guardianship today—much of which we have heard today already—and to propose some areas for reform, including the Federal role in this effort. How did we get here?

Guardianship is as old as the common law, a 13th century institution. But from the very beginning it has been a mixture of benevolence and self-interest. From the beginning, the head of state, the king assumed a benevolent and protective role toward the elderly

and the mentally disabled, but not because they were persons, but because they owned assets which were the source of money for the crown. That theme of giving with the one hand and taking with the other has characterized guardianship for the centuries that it has perdured in England and in its adoption in America.

For a while, we as a society began to move many of the elderly into State mental hospitals when families would no longer be able to help them or when the individuals themselves had no assets. But then about 25 years ago, we discovered de-institutionalization and we no longer thought of State mental hospitals as the proper place for what some have called the warehousing of the elderly. Instead, what has happened now is that many, many of the elderly live in nursing homes; many more live with their families, and many live by themselves in the community in varying states of health.

So the pressure is on the system now to deal with many, many more elderly in situations other than the traditional mental hospital in this country—at least those elderly who are becoming frail or disabled. In addition, the lengthening of life expectancy—those over 85 are the largest growing segment in the country's population—means that the number of elderly who may need the assistance of others is also growing from the demographics of the situation.

About 30 years ago this country focused on the scandal of the State mental hospitals and, as a result, States began to reform their civil commitment law. By and large, they did a good job in incorporating due process considerations into the hearings and the criteria that were used to commit people.

But guardianship law was ignored; and it has been, and still is, considered a backwater area of mental health law. It receives very little attention and there are some villains in the piece, as I think has been suggested along the way, as to why that situation continues. I will address more of that later.

But the reality—and I think we have heard much of it today—is simply that guardianship in many cases is one of the most repressive instruments in our society for depriving the elderly of their rights. And yet, it comes masked as a benevolent helping hand.

The basic problems are twofold: the guardianship laws themselves need reform, and the courts which administer these laws often fail to act as protectors of the parties' rights.

Let me try to summarize where we have been this morning in term of the specific problems in guardianship.

First, the legal criteria in many State laws, as applied in the courts, treat incompetence—which is a social judgment about a person's ability to continue as a self-functioning individual in our society—as a medical diagnosis, like taking one's blood pressure. And it is just as easy to get the kind of diagnosis that leads to a deprivation of rights as it is to have one's blood pressure taken.

Secondly, old age itself in many States can be the basis for the deprivation of liberty, if a person simply acts with any of the eccentricities that we all develop in the passage of years.

As we have heard, the court proceedings that administer these criteria are often a travesty of justice. Legal notice to the ward—if it is given at all—may be in unintelligible legalese.

The elderly person is frequently not present in the courtroom. The testimony which is admitted in support of the petition, and we have heard much reference to it today, comes in through affidavit, by and large.

How does one cross-examine an affidavit, if one were so inclined, if one had representation by counsel? There should be a requirement that testimony as to medical diagnosis by the expert witness for the petitioner be presented in person on the basis of personal examination.

And as we have heard, the prospective ward very often has no attorney; or worse still, if he does, the attorney acts in a confused way according to the standard of what he thinks, in combination with the judge is, in the best interest of the client, rather than acting as a true advocate for the client. The Chief Judge of New York once remarked that a good prosecutor could get an indictment from a grand jury for a ham sandwich. I maintain that a good lawyer for a petitioner could get a guardianship for a pizza pie, and get it quicker than it takes to cook one. And perhaps Mr. Godes' fictional client today is the next step toward that kind of swift injustice.

The consequences of guardianship are drastic. We have heard about the total deprivation of civil rights which results in many jurisdictions. What we haven't heard so much about is the very high cost of guardianship, which can drain the assets of a ward in a relatively few years.

And yet with all of this, guardianships are not being terminated; and court supervision, if it occurs at all, is minimal.

Let me, therefore, suggest some proposals for reform.

There has been much academic and scholarly interest in the last few years in the complexity of mental capacity in the elderly. We have learned much as the science of geriatrics moves forward. This knowledge, however, has not been reflected in the way State laws defining incompetency are drafted.

The guardianship proceeding needs to be made adversarial, and lawyers have to be educated to understand that their role is to serve as an advocate for what the client wants, not as a secondary judge who decides what he himself thinks is in the best interest of the client.

I think we need some form of professional interdisciplinary screening of persons proposed as wards to assist the judge in deciding the type of intervention which is appropriate for the particular needs of the person alleged to be incompetent.

And, of course, we have heard that a limited guardianship is constitutionally and practically a sensible thing to do.

A caution here: Many States have adopted limited guardianship in their statutes in recent years. They are becoming aware of its importance. But in the various States I have visited and in a study done several years ago by the American Bar Association, it has become quite evident that the courts, despite their authority to use limited guardianship techniques, have not done so—almost uniformly have not done so.

The reason seems to be twofold: a matter of convenience for the petitioner so that they don't have to come back again in a year or two; and expense, since it does cost money for a petitioner to have

to come back, even for a short court visit, and pay the expense of an attorney.

So somehow or other the State law has to mandate—as you, Mr. Chairman, have suggested—that findings be made on the record that in effect force the court to confine the powers granted to the guardian to what we call a limited guardianship and not to be able to ignore that duty without challenge on appeal, or at least some review.

Guardianships ought to be of the sunset type—that is, that they expire unless renewed after a period of time: one year, two years, whatever seems appropriate.

Judge Schwartz—an eminent judge in New York—did just that in the *Merrick* case mentioned earlier. And I think she, although an exception, is certainly to be commended in her approach to that guardianship.

One of the hidden areas of guardianship is the lack of scrutiny by court personnel of reports submitted by guardians in those States that require such reports.

It is not for lack of interest, I think, although that certainly occurs at times. It is simply the fact that scrutiny is a low priority item. There is no pressure within the system for court personnel to scrutinize those reports, and it is only when an occasional energetic court clerk identifies a problem because of a routine habit of looking at these reports, that we ever begin to see some of the problems in them.

Where does the Federal Government fit in this reform effort?

Obviously—and you, yourself, Mr. Chairman, have referred to it—the Congress does have a responsibility to protect the victims of a guardianship from being deprived of liberty and property, rights protected by the due process clause of the Fourteenth Amendment. Section 5 of the Fourteenth Amendment explicitly says that the Congress has the power to enforce the constitutional rights given by earlier sections there.

Therefore, it seems to me that Federal funding need not be the only basis for intervention by the Congress but that a civil rights issue is at stake here. And just as in other areas, in protecting the rights of the developmentally disabled, and protecting the rights of the institutionalized elderly, the Congress has stepped in, it seems to me it would be entirely appropriate for the Congress to consider something like "rights of wards" legislation which would spell out the minimal standards which the Congress believes are appropriate for both the criteria and the conduct of guardianship proceedings throughout the States.

I must say, this committee, too—the House Select Committee on Aging—has a responsibility here as well. You took the lead years ago in identifying the problems of elderly abuse in this country, and States have jumped on a bandwagon—or almost that—in the last seven or eight years in enacting mandatory reporting legislation and in expanding their adult protective services programs.

But what we haven't heard much of today is that those programs are in many cases the basis for the increased intervention that we are seeing by public guardians and by public agencies in creating guardianships.

You have set in motion an intervention system, through funding and through exposure of abuse, which itself now is beginning to use the guardianship proceeding to protect the abused elderly, despite all of the abuses in the guardianship proceeding itself.

I have heard any number of cases of social agencies, public agencies, going into court and getting guardianships quickly and almost secretly through the same proceedings that we have heard described today; and doing it on the basis of a responsibility that they now have under the Older Americans Act or under Title 20 of the Social Security Act.

So, my suggestion is that the next step in your follow-through on promoting elder abuse and adult protective services programs is to make sure that the intervention which occurs in some of the cases is done with proper respect for the rights of those who are being helped.

There are some other more traditional funding devices that the Federal Government might use:

First, why not amend the Older Americans Act, or Title 20 of the Social Security Act to require assurances from the States that the rights of persons being served under those programs will be adequately protected in guardianship and protective proceedings. This approach puts the ball back in the court of the States as a condition of Federal funding.

Second, require that legal representation—and we hope it will be of a proper type—be made available to people who are the subjects of guardianship or protective proceedings, at least in those cases where the petition has been initiated by a public agency utilizing Federal funds.

Third, could not State plans for SSI and Medicaid participation be required to give assurances that State guardianship and protective proceedings will provide adequate safeguards for the protection of the civil rights of the recipients of those benefits?

Fourth, another area we haven't talked about today is the need for tightening the standards for appointment of representative payees for public benefits under the various Federal benefit and pension programs: the Social Security Act, Railroad Retirement, and various other programs.

Finally, might you not consider the possibility of requiring a screening prior to admission to a nursing home of persons who are represented by a guardian or by a family and who themselves have not consented to such admission, to determine whether the guardian or the family is in fact acting in the best interest of the person in selecting that particular form of intervention on behalf of a ward?

This procedure might remove some of the abuses which we have seen in the admission of persons under guardianship to nursing homes.

I thank you, Mr. Chairman, for the opportunity to share these views the committee.

[The prepared statement of Mr. Regan follows:]

PREPARED STATEMENT OF JOHN REGAN, PROFESSOR OF LAW, HOFSTRA

I am John J. Regan, Professor of Law at Hofstra University School of Law in Hempstead, New York.

I speak, in a sense, as an unelected representative of one of the last of the "invisible minorities" in our society - the elderly whose basic right of self-determination has been taken away by government and given to another. The legal device for this action is guardianship. I propose to trace its development through a moment or two of legal history, to assess the reality of guardianship in 1987, and to propose some areas for reform, including the federal role in this effort.

Guardianship is as old as the common law itself. English law established the principle 700 years ago that the king, as father of the country (parens patriae), was responsible for the protection and care of the person and property of the mentally ill. The king exercised this power through the chancellor who was authorized to conduct an inquiry whether the subject had been born with "no understanding" or had lost the use of reason, and also whether the person was the owner of assets likely to be dissipated. If the person was found by a jury of peers to be without reason, he would be committed to the care of a friend, who would receive an allowance from the assets to pay the costs of services and care for the ward. Responsibility for managing the assets typically was assigned the ward's heir. The chancellor opened this inquiry only if the alleged incompetent had assets sufficient to bear the expense of this help. If the person was poor but incompetent, he would be left alone.

In Colonial America, a similar policy prevailed. A family anxious to preserve the assets of a disabled elder would obtain a guardianship. However, the mentally disabled who lacked both assets and family were left to drift at the mercy of fortune, singly or in company with others. Gradually the states began to build mental hospitals to care for those who were violent. Eventually, these hospitals became warehouses for all types of mentally disabled persons, especially the elderly.

But then, in the 1950's and 1960's we discovered "deinstitutionalization", and the elderly were no longer routinely committed to mental hospitals. Many went to nursing homes, while many more stayed with their families or lived by themselves, often in isolation and poverty. However, as the numbers of the elderly grow and as their age span lengthens, concern about the welfare of those evidencing mental disability has also grown.

State intervention in their lives through guardianship and adult protective services programs is increasing. Yet guardianship, the chief legal mechanism for effecting this intervention when the elderly person does not give consent, has received relatively little attention, in spite of the widely held opinion that the practical reality of adult guardianship in many states is that the statutory criteria, the court proceedings, and its legal consequences make it an inappropriate and sometimes repressive instrument for assisting the elderly.

To justify appointment of a "guardian of the person" or a "guardian of the estate" (also known as a "conservator"), a court must find upon petition that a person is incompetent. An incompetent is defined traditionally as one who, by reason of mental illness, drunkenness, drug addiction, or old age is incapable of caring for himself and/or managing his business affairs or providing for his family, or is liable to dissipate his property or become the victim of designing persons. In declaring a person incompetent, a court is actually making two findings: (1) that the person suffers from a condition affecting mental capacity; and (2) that certain functional disabilities result from this condition, namely inability to care for self or manage one's property.

In practice, courts tend to place too much weight on the first criterion and to pay too little attention to the second. Judges tend to see competence in medical or psychiatric terms. They rely on the physician, the psychiatrists or the psychologist to diagnose the existence of some condition which fits the first statutory criterion, in much the same way as a physician diagnoses high blood pressure. Thus, for example, a psychiatrist may testify that, in his or her opinion, the person's behavior is symptomatic of a particular type of mental illness. This opinion is then transformed by the court into a legal conclusion that the person is "incompetent" and therefore needs a guardian. What is overlooked in this process is that the psychiatrist's own diagnosis may include value-laden judgments about the person's behavior. More importantly, little, if any, attention has been paid to the actual functional abilities of the proposed ward. No one in the proceeding may have testified as to how the person manages with the daily activities of life. By relying so heavily on the expert's testimony, the judge may have abdicated his or her unique role as the community's representative for determining

whether the ward may continue to function as autonomous individual. Incompetence is thus converted from a legal judgment to a medical diagnosis.

Furthermore some states use "old age" as a synonym for "senility", although it obviously refers only to the passage of years. It is easy to label a few behavioral aberrations sometimes associated with old age, such as forgetfulness or careless habits, as "chronic brain syndrome" and again jump to the conclusion that the person is incompetent and therefore in need of a guardian.

The court proceedings themselves for appointing a guardian are often characterized by an unhealthy informality.

1. Notice of the filing of a guardianship petition may be defective, either in allowing only a short period for response, in providing uninformative notice to the prospective ward, or in completely waiving any notice requirement in certain cases.
2. At the hearing the alleged incompetent is rarely present, particularly when a doctor's affidavit stating that appearance in court might produce a harmful effect on the person is submitted to the court. The court never assesses whether that risk really exists, and thus the judge loses the opportunity to see the person and form his own judgment as to the person's capacities.
3. Even the doctor who has examined the person and who believes that the individual is incompetent, and whose opinion so mightly influences many judges, typically never appears in court for cross-examination. His or her testimony is supplied by affidavit, thus preventing any serious investigation into the physician's basis for the diagnosis and opinion.
4. Representation of the proposed ward by legal counsel seldom occurs, and when it does, it may be of a perfunctory nature. Lawyers often see their role in representing a potential ward as requiring them to look out for their client's "best interests," rather than as an advocate whose job is to resist the petition in accord with the client's wishes.

The result of all this informality is that frequently the only persons present in the courtroom are the judge and the attorney for the petitioner. I suspect that under these conditions a good lawyer could get a guardianship for a pizza pie and, probably faster than it takes to bake one.

But the dismal story doesn't end here. The consequences of the appointment of a guardian are drastic. The person found to be incompetent is thereby rendered virtually incapable of performing an act bearing legal consequences. He or she often will be limited in his ability to execute documents, initiate litigation, participate in business and professional activities, and exercise political rights and privileges. The guardian may assume complete control over and even title to the ward's property and decide where the ward will reside. It is this "all-or-nothing" character of the guardian's control that makes a traditional guardianship such a poor instrument for assisting those elderly who experience only a partial and gradual deterioration in functional capacity. Many elderly persons require assistance only with certain recurring duties, such as paying bills, or with certain transactions such as selling a house. They need a flexible guardianship tailored to their individual capacity that allows them to retain control over other decisions which they are capable of making without such assistance.

Another unwelcome effect of a guardianship is its high cost. Persons with modest assets may find them rapidly depleted to pay for a conservator's statutory fee. On the other hand, the poor or those living on small fixed incomes may be deprived of needed guardianship assistance because of the lack of financial incentives for others to assume such duties.

These are some proposals for reforming state guardianship laws:

1. The criteria for determining incompetency should emphasize functional disability rather than mental illness. The focal point of this finding should be inability to make rational decisions, i.e.g to engage in the process of absorbing information, weighing consequences, and reaching a decision about one' affairs.
2. Guardianship proceedings should be adversarial, and, therefore, counsel, private or appointed.

should be mandatory. The traditional elements of procedural due process - the right to present evidence, to confront and cross-examine adverse witnesses, and to receive a decision based on the evidence, among others - should be present.

3. To assist courts in determining what type of intervention is necessary in an individual case, an interdisciplinary a professional screening team should be established. This group would conduct a thorough assessment of the physical, mental, and social needs of any individual who is the subject of commitment, guardianship, placement, or emergency proceeding and present to the court its recommendation concerning the least restrictive course of care or treatment consistent with the person's welfare.

4. The court should be authorized to delegate to the guardian only as much power over the disabled person as is needed to compensate for the person's incapacity. Or to put it differently, the disabled person should retain as much power over his life as is consistent with his or her functional abilities.

5. Guardianships should terminate automatically unless renewed by the court. The burden of justifying continuation should be placed on the guardian or other persons, instead of requiring the disabled person to seek release. Regular accounting, not simply about property management, but also about personal care functions performed by the guardian, should be required. Courts, in turn, should scrutinize these reports to determine whether guardians are performing their duties.

6. Private social services agencies should be empowered to act as guardians to avoid institutionalizing the elderly poor with no family or friends willing and available to serve in that capacity.

Many of these reforms are the responsibility of state legislatures and state courts. But the federal government also

has a role and a responsibility. The victims of a "quickie" guardianship proceeding are being deprived of their liberty and property without due process of law, a violation of the 14th Amendment to the Constitution. The Congress has a special role, according to Section 5 of that Amendment, in enforcing the due process clause. Moreover, the federal government, through the Older Americans Act and Title 20 of the Social Security Act, has taken an active role in promoting and funding the very protective services programs which rely on guardianship and other protective proceedings. That same legislation has as one of its primary goals furthering of independent community living by the elderly.

What can the federal government do? Let me suggest the following:

1. Amend the Older Americans Act and Title XX of the Social Security Act to require the states to give assurances:
   (a) that the rights of persons served by their federally supported protective services and elder abuse programs will be adequately protected in guardianship and protective proceedings;
   b) that legal representation will be made available to persons who are the subject of guardianship or protective services proceedings, at least where the petition is initiated or supported by a public agency utilizing federal funds.
2. Require that state plans for SSI and Medicaid participation give assurances that the state's guardianship and protective proceedings will provide adequate safeguards for the protection of the civil rights of the recipients of these benefits.
3. Tighten the standards for appointment of representative payees under various federal benefit and pension programs.

I am grateful for the opportunity to share these views with the Subcommittee.

Mr. PEPPER. Thank you very much, Mr. Regan, for your valuable suggestions.

I was pleased to hear you say you considered the Voting Rights Act and the Civil Rights Act and the others as precedents. I see no reason why the knowledge doesn't exist with respect to *Brown* v. *Board of Education*, which reaffirmed the right to education. The right to vote is certainly not a local right, and yet it had been viewed as such before the enactment of the Voting Rights Act. We now recognize voting as a right not to be proscribed, according to our Federal Constitution, by the States themselves. And yet, it took Federal action to see to it that that right to vote, that Constitutional right, was properly protected.

So I think what you have said and what Mr. Pickering has said justifies the Federal Government taking action with regard to guardianship.

While you were speaking, it occurred to me we may need to have some sort of a Federal agency the duty of which would be to protect the rights of the elderly, since they are such an important part of our population and are increasing in numbers. There are so many abuses of them that this committee might well consider setting up some sort of a Federal agency, and giving it authority to aid the States and to see to it they carry out their responsibilities.

I think there is a commission to oversee voting rights, isn't there, and to oversee civil rights. And other than children, I don't know of any group more deserving of proper protection than the elderly.

Now a while ago one of the witnesses testified that some Social Worker diagnosed him as having Alzheimer's disease, and another doctor went along with the opinion upon which he was admitted to a hospital as a patient with Alzheimer's disease. Of course, the doctor has not done any kind of exam, which was a gross violation of the patient's civil rights.

And yet, somebody has to see to it that these rights are protected. If the States are doing a good job, fine, commend them, help them. We want to see to it that a good job is being done. These people are entitled to have their rights protected.

You have a right to vote, and you're supposed to have the protection of that right against intimidation and other things that might interfere with it. You have other civil rights that deserve to be protected, too.

A few months back, I was out at the University of Southern California and Dean Schneider of the Andrus Gerenotology Center there said that one out of every three people over 65 years of age are vulnerable to Alzheimer's disease. But Alzheimer's disease is a very tricky disease which is difficult to diagnose. So somebody is going to come in to say they have Alzheimer's disease and put a guardian over them and the like—maybe they haven't even got the illness.

So we are very much indebted to all of you. This is a distinguished panel. I notice we had four or five television stations here today, as well as our representatives of the press. I hope we can bring this matter to the awareness of the public.

When we first had our hearing on abuse of the elderly back in 1978, very few people thought much about it then. Yet the number

of people abused has been increasing at the rate of about 100,000 a year since that time.

We know that, to get action on any issues, we have to bring it to the consciousness of the public. The people then will help us get something done properly at the State level and at the Federal level.

On behalf of the people of America, as well as the Congress, I want to thank all of you witnesses for the valuable contribution you have made.

Thank you very much.

The hearing is now adjourned.

[Whereupon, at 12:25 p.m., the hearing was adjourned.]

APPENDIX I

QUESTIONS AND ANSWERS

What is guardianship?

Guardianship is a relationship whereby the legal rights, possessions and decision-making power of one person (the ward) are transferred to another (the guardian) once a determination has been made that the ward is unable to handle his or her own affairs.

While guardianship was designed to protect the elderly, it is a process that is often used to take advantage of them. Guardianship in many ways is the most severe form of civil deprivation which can be imposed on a citizen of the United States. An individual under guardianship typically is stripped of his or her basic personal rights such as the right to vote, the right to marry, the right to handle money, and so forth.

How many older Americans are under guardianship?

Today, there are more than 500,000 older Americans under guardianship. A complete accounting of court records could bring this figure much higher.

Who are these elderly?

Most elderly placed under guardianship are very old, widowed, and live in a nursing home, boarding home or apartment. Their average age is 80. The majority of wards are women who have outlived their spouse. And more than half are in nursing homes.

While many of these older Americans genuinely need assistance in managing their own affairs, many can do some things for themselves. Others were either never or are only temporarily unable to completely manage their own affairs.

For example:

> Miss. M., an 81-year-old woman from Kansas, suffered a stroke. When she returned home, she learned that while she was in the hospital the court had appointed a guardian to manage her affairs. Miss. M., one day after mowing her lawn, was forcibly taken to a nursing home under orders of her guardian. This healthy and active woman spent 5 weeks in the nursing home unnecessarily at her expense and against her will before she was able to have the guardianship removed.

Who can be a guardian?

Virtually any mentally competent person can legally become the guardian of a person determined incompetent. This person is often the one who initiates the effort to have an elderly person declared incompetent. Despite the fact that a guardian typically has complete legal control over his or her ward's finances and personal well-being, there are typically no requirements that guardians have any special knowledge of accounting, social work, or law or that they meet any minimum qualifications of education, experience or intelligence. In fact, only 18 states place any restrictions whatsoever on who can become a guardian, and in only 5 States are convicted felons prohibited from being appointed guardians!

For example:

> A 23-year-old Michigan barroom janitor, with no training or experience in accounting, social work or law, was given the job of public guardian. Within one year, he was responsible for 80 people's lives and their $350,000 in income and assets. He was later convicted of embezzling $130,000 from his wards.

Another alarming trend in guardianship of the elderly is that, while 70 percent of guardians are family members of their wards, there is a growing number of for-profit companies specializing in guardianship. These businesses often handle large numbers of wards and have little or no personal interest in the well being of their wards. They profit off mostly helpless people.

Do courts require that guardians receive special training once appointed to control another person's life?

Rarely, if ever, is any kind of training provided or required under the law. In fact, fewer than 20 percent of courts ever provide guardians with instructions as to their duties and legal responsibilities over their wards.

What is the legal process by which a person can be put under guardianship?

While the legal process by which a person is put under guardianship varies from state to state and from locality to locality, indeed from court to court, the common thread that runs throughout is that the "accused" incompetent has the deck stacked against them. An analysis of over 2,000 guardianship cases by the Associated Press found that fully 97 percent of petitions for guardianship were approved.

The guardianship process generally begins with the prospective guardian filing a petition in a county probate court. A judge usually hears the case (although in some counties the court clerk or other court official presides) and makes a ruling as to whether the "accused" is unable to manage his or her own affairs. As noted to above, very rarely is there a review of the appropriateness of the individual attempting to be named guardian.

The "accused" incompetent elderly person has few if any rights once placed under guardianship. In fact, he or she often has fewer rights and protections than an accused murderer in the process of adjudication. When one considers the following facts from the Subcommittee's review of pertinent state laws and literature, it is not difficult to imagine how 97 percent of guardianship petitions are granted:

- Only 14 States require that allegedly incompetent elderly people be informed as to their legal rights (right to counsel, right to present evidence), or what rights they stand to lose if placed under guardianship, before a judgment is made of their competence.

- 8 States have no requirement that the "accused" be notified that someone is petitioning to have them placed under guardianship and many others allow waiving of such a requirement. This is clearly a violation of basic due process under the law.

- 15 States do not specify that the elderly person has a right to counsel at the guardianship hearing.

- Only 16 States require that the elderly person be present at his or her own guardianship hearing. A recent study revealed that in 84 percent of cases, neither the "accused" elderly nor a legal representative was present at the guardianship hearing.

- 33 States allow "advanced age" as a cause for determing an elderly person's competence and whether or not he or she should be placed under guardianship.

- Only 12 States require that medical evidence be submitted in order to find a person incompetent and therefore able to be placed under guardianship.

The Subcommittee independently confirmed the ease with which a person can be placed under guardianship. It was found that in many instances, with a minimum of effort, time, and money, a guardianship could be obtained. Simple forms regarding the alleged incompetent's general condition were required to be filed. In no case was the alleged incompetent required to be present at the hearing. In no case was the alleged incompetent required to be represented by legal counsel. The Subcommittee was told that hearings on this important legal matter could be as short as 5 minutes.

What checks are in place to protect an elderly person from abuse by his or her guardian?

There are few. Only half the States require that guardians file an annual report of their wards' well-being. Six States do not require

any financial accounting of wards' monies. Even in the States that do require financial reporting, there is often little or no auditing of these reports. In Virginia, for example, the Subcommittee was told by an individual who works in the system, "The only thing that matters is what's on the bottom line of the statement. As long as income and outgo match up, no questions are asked. It doesn't matter whatsoever what the elderly person's money has been spent on or how much. That's why there are so many problems."

An investigation by the Associated Press found that nearly half of the files on guardians were missing at least one annual accounting of money. Only 16 percent of the files reviewed contained reports on the elderly ward's well-being.

What are some of the other most frequently cited problems with the current American guardianship system?

1) There is a marked lack of due process in most States in the procedure by which a guardian is appointed. A person does not have to display evidence of training to be a guardian. There is no minimum requirement of education, experience or intelligence in any of the 50 States, the District of Columbia or the territories.

2) The courts that handle guardianship (usually probate courts) are terribly overburdened, so that even in cases where guardianship is proper and appropriate, there are no followup checks to monitor the progress of the guardianship arrangements. Although laws in 44 states require guardians to file regular accountings of a ward's money, these files were missing or incomplete in 48 percent of guardianship files examined in a recent Associated Press survey. According to AP, 13% of cases had the opening of guardianship as the last entry in the file. In 34% of cases, the closing of the guardianship was the last entry in the file.

3) There is a powerful and unique abrogation of rights when a person's care is entrusted to another under a guardianship arrangement. Typically wards have fewer rights than the typical prisoner -- they can no longer receive money or pay their bills. They cannot marry or divorce. By appointing a guardian, the court entrusts to someone else the power to choose where the wards will live, what medical treatment they will receive and, in rare cases, when they will die.

How can an elderly person get out from under guardianship?

Procedures for terminating a guardianship vary across the nation. However, in nearly all areas, it is a very difficult and time-consuming proposition. Thus, for an individual who has been wrongfully found incompetent and wishes to "appeal" the finding, or an individual who was only temporarily unable to manage his or her affairs, to have control over their own lives restored is often difficult if not impossible.

Because the elderly person under the law is frequently prejudged "incompetent" and has few legal rights, getting access to the legal system is often difficult. Many are not able to secure the services of an attorney. Many have been placed in nursing homes and have little ability to appear before the court.

For example:

> Ms. V of Florida, a 66-year-old professional, was on her way to work when she was got into a serious car accident which left her comatose for two months. She recovered completely and only found out when she went to vote that she had been determined incompetent and therefore could not vote. While she was comatose, her daughter had her declared her incompetent. Without any money, Mrs. V had to go to the library and research on her own what she would have to do to get out from under this. After 7 trying months of research, writing and regular visits to the court, the guardianship was removed. However, Ms. V is outraged that in official legal records she still is listed two ways: as Ms. V and Ms. V, Incompetent.

What are some other examples of guardianship abuse?

Abuses in guardianship take all shapes and forms, and claim as their victims people in all walks of life, from Broadway producers to chicken farmers. Abusers can be daughters, sons, friends, attorneys, or for-profit guardianship companies among others.

* A Grand Rapids, Michigan woman admitted taking $45,000 from the estates of mentally incompetent persons and spending the money for a car, clothes and vacations.

* A Denver mother defied a judge and sold a house that belonged to her child. The proceeds have never been accounted for.

* A typical ward of the court is John A. Sward, a World War II veteran in Los Angeles who suffers from service-connected mental and emotional problems. He receives $1,295 in monthly benefits from the Veterans Administration.

  Several years ago, Sward was befriended by the operator of the motel where he was staying. The motel operator, David Gold, became Sward's conservator. But in 1981, probate investigator, Edith Reid, filed a report in court that Gold had spent $10,767 of Sward's money on a car, even though Mr. Sward had no driver's license and got around town by bus. The woman who managed Gold's motel "drives the vehicle to her dance classes," the investigator reported. The Veterans Administration asked Gold to resign as conservator after he failed to file an accounting.

* The relative ease with which an estate can be put into conservatorship is shocking in many instances. In another hotly disputed case, the $140 million estate of Los Angeles real estate developer, Ben Weingart, was put into conservatorship without his presence in court. Mr. Weingart died in 1980 at the age of 92, but his friend and live-in companion, Laura Winston, has doggedly pursued legal efforts to show that the conservatorship was conceived in fraud. In 1974, three of Weingart's business associates petitioned the court to become conservators of his estate on the grounds that his health was failing and Winston had designs on his money. But according to her, "Ben was in good condition when this happened. He went to work every day." Nevertheless, a doctor's report said, in effect, that Weingart's well-being would be impaired if he attended hearings on the petition. The three associates, who were financially indebted to Weingart, were appointed permanent conservators.

* Revia Karl, a frail, 84-year-old woman, is living her last years in a psychotic haze in an Inglewood, California hospital. "She has no knowledge of what is going on," says a hospital spokesman. Mrs. Karl doesn't know that her grandson, Jerry M. Karl, ran through most of her $75,000 in assets after a court appointed him her conservator. Mr. Karl wasn't charged with any wrongdoing, although he was replaced as conservator last year. "I screwed up my grandma's estate," concedes Mr. Karl, 36, a former mathematics teacher. "I've lived on her money for the last two years."

* In Washington, D.C., an attorney acting as conservator took $376,000 from an elderly man's estate. He later pleaded guilty to fraud.

* A Colorado woman, conservator for her ailing husband, spent $80,000 of his funds on her son's business.

* Sometimes conservators simply lack the know-how to oversee an estate. Nearly all of Regina Aberson's $250,000 was wasted in the failure of her daughter, Eugenia Hershenson, "to use ordinary care and diligence" as conservator, according to an attorney's report to the Los Angeles Superior Court. The attorney, who represents the estate's new conservator, says Mrs. Hershenson with court approval had turned over her mother's money to a stockbroker to put into low-risk investments. Instead the broker used the money to trade options. Hershenson has been replaced as guardian.

* In Chicago, relatives of one elderly woman sought a ruling, declaring her incompetent. "She wasn't, but she had a schlock

lawyer who never put her on the stand," says Patrick Murphy, Cook County public guardian. A judge granted the request, then ordered the woman to pay both sides' legal fees. Murphy observed, "It cost her $18,000 to have her constitutional rights taken away."

- Mrs. H., an elderly woman from California, had her estate depleted and her house sold by her son-in-law who had been named her guardian. When her son-in-law was named guardian, Mrs. H. had an estate worth $167,000. By the time he was removed 8 years later, all that remained was $3,000. The son-in-law used Mrs. H.'s money to purchase a new house for himself.

- A Florida lawyer cites the case of a daughter who wanted control of her elderly parents' finances. A judge ordered a psychiatrist to investigate but the father, caught off guard, refused to admit the doctor to his home. The expert declared the man a "paranoiac," and the judge ruled for the woman.

- In some cases, judges have used guardianship appointments to supply old political cronies with easy money. In Hartford, Connecticut, a banker and a court-appointed conservator in one year charged $500,000 in fees for handling the $32 million estate of an ailing octogenarian. When the Hartford Courant disclosed the arrangement, the uproar was so fierce that Probate Judge James Kinsella, a friend who had named the conservator, retired early following a vote by a committee of the State Legislature to impeach him.

- In Arizona, authorities filed suit seeking to force a daughter to move her mother from a state mental hospital to a private rest home. Officials charged that the woman would rather keep the mother in a free public hospital than deplete her inheritance.

Are there any Federal laws or national uniform standards for protecting those elderly under guardianship?

No. Although our nation just celebrated the 200th anniversary of the Constitition with justifiable pride, over 500,000 elderly Americans under guardianship could not take part in the parade. There are no Federal laws designed to afford basic protections in the guardianship process. The United States can take no honor in being one of the only industrialized nations on earth that lacks such a system. Even the Soviet Union has a national code for the protection of the elderly.

What reforms are needed?

There must be national uniform standards enacted to protect elderly and others under guardianship from abuse. At a minimum, such standards should include:

- A uniform test of competency, completed by a psychiatrist, social worker and general medical doctor before guardianship may be granted.

- The proposed ward must be given sufficient notice prior to the competency hearing and must be present (unless a doctor declares he or she unable) and represented by legal counsel.

- The elderly person must receive a clear and concise explanation of his or her rights under guardianship.

- There must be minimum standards of character and training for those who serve as guardians. This should include instructions from the court as to their duties as guardians.

- Guardianships should be as limited in length and scope as is feasible. Wards should have regular rights to appeal and access to court system for such purposes.

- Financial and personal status reports should be submitted to the court for each ward at least once a year. Courts should maintain sufficient staff to substantiate these reports.

These reforms may require additional funding. But the richest nation in the world, which values liberty highly, can certainly afford to protect the basic civil rights of our most vulnerable.

APPENDIX II

PUBLIC GUARDIAN - PUBLIC CONSERVATOR

COUNTY OF HUMBOLDT

825 - 5TH STREET

EUREKA, CALIFORNIA 95501 · PH. (707) 445-7343 · 445-7344

October 8, 1987

Honorable Claude Pepper, Chairman
Sub Committee on Health and Long Term Care
Select Committee on Aging
Room 377 House Office Building, Annex 2
House of Representatives
Washington, D.C. 20515

Dear Chairman Pepper:

On behalf of the California Association of Public Guardians and Conservators, I would like to submit the following information to your subcommittee in its consideration of the guardianship issue; and although I am aware that your staff has completed lengthy research and the Associated Press has also just completed a series of articles on the subject, our Association feels that your committee may learn something more by considering this information about Public Guardianship in California.

It may also be of interest to you to know that the first ever National Meeting of Public Guardians was convened in Santa Rosa, California in conjunction with our annual Association meeting this past month. The states of Alaska, California, Florida, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, North Dakota, Ohio, Oregon, Tennessee and Washington were concerned enough about the issues of guardianship to send representatives. As a result of this first meeting, the National Guardianship Association was created with the first meeting of this newly formed association tentatively scheduled for October 1988 in Chicago, Illinois.

From the discussion that was generated by this first session, it was clearly apparent that there are many people representing both private and public agencies who are vitally concerned about how the issue of guardianship is addressed across this nation. It is their belief that through this new organization can come the kind of meaningful dialogue and necessary exchange of viewpoints that will lead to an improved means to serve those in this country for whom guardianship is the best alternative. Perhaps you or members of your committee will want to attend that conference. We will certainly keep you informed.

The California Association of Public Guardians has been in existence since approximately 1942. All California counties except for several of the smallest, most rural participate in the Public Guardian program and some of those smaller counties without their own Public Guardian contract for services with their larger neighbors.

California counties are authorized by statute to create the office of Public Guardian.

The principal statutes that these Guardians work under are the California Probate Code and the California Welfare and Institutions Code. Conservatorships under the Welfare and Institutions Code are primarily for those suffering from mental illness and are considered to be "gravely disabled". Gravely disabled is defined as unable to provide for personal needs of food, clothing and shelter. Conservatorships under the Probate Code can be limited for developmentally disabled adults or for those who are considered "unable properly to provide for their own personal needs of food, clothing and shelter and are substantially unable to manage their own financial resources or resist fraud or undue influence."

California's Public Guardians feel that our statutes provide excellent protection and a well defined system of judicial review for those proposed for guardianship or conservatorship in California. (Note: In California law, Guardianships are for minors only. All others are conservatorships.)

In most cases, proposed conservatees are represented by either private or court-appointed counsel. In all cases, proposed conservatees must appear at their hearing unless they are physically incapable of doing so, and there is an Affadavit of a Professional Person to that effect on file with the court. In those cases, the court appoints a trained investigator to review the proposed conservatorship, interview the proposed conservatee, and make a formal report back to the court.

Other statutory checks and balances, safeguards if you will, are the mandatory accounting process, writs of Habeas Corpus, automatic termination of conservatorship at a prescribed time, and the right to trial by court or jury. The review process in California Probate conservatorship cases allows for an accounting and review at the end of the first year and then biennially thereafter. Many of us in the Association feel that remedial legislation to make the accounting and review process an annual requirement such as is the case in Welfare & Institutions Code conservatorships might go far toward further protecting the conservatee from any wrongdoing on the part of the conservator, especially in the area of private conservatorship administration.

Safeguards beyond those provided in California law that affect Public Guardians are many. First are the family and friends of

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conservatees who may not be able to act as the conservator but who have an abiding interest in how the Public Guardian administers the conservatorship. Secondly, the conservatee's attorney and the County Grand Jury are sources of constant inquiry into the activities of County agencies such as the Public Guardian. County Boards of Supervisors who, in most cases are the elected body that appoints the Public Guardian, are constantly evaluating their Department Heads and looking out for the interests of the constituents who elect them. In those California Counties where the Public Guardian is, himself, an elected official, his own constituents constantly review his office practices and his integrity to hold the office to which they elect him.

Some of the most impressive and aggressive agencies which review the practices of California Public Guardians are advocates for Senior Citizens Councils. These trained senior advocates include the Ombudsman, Linkages, and M.S.S.P. programs now active in most California counties.

Other advocates for those conserved in California include Area Developmental Disability Boards for those adults under limited conservatorship and Patients Rights Advocates and the California Alliance for the Mentally Ill for those suffering from psychiatric disorders.

Other groups which monitor the functions of Public Guardians on behalf of their senior and elderly clients are County Elder Abuse Task Forces and organizations such as the "Gray Panthers". It might be of interest to your subcommittee to understand that in many counties, the Public Guardian is an integral part of policy groups concerned with the abuse of elders. In some counties, for instance, Public Guardians have served and do serve on Elder Abuse Task Forces, Long Term Care Committees of local Ombudsman organizations, County Associations for Retarded Citizens, etc.

In the final analysis, the best safeguard for those under Public Guardianship in California may be the Public Guardians and their staffs. The California Association of Public Guardians has long felt the need to have adequately-trained and certified deputies handling the sensitive cases of those under their conservatorship tuteledge. The Association will, this year, complete a set of standards and a statewide certification process for its deputies. This process was initiated and will be implemented, not at the insistence or direction of some state or other governmental agency, but because its individual members recognized the need to better serve its clients by insuring that they were being served by those whose integrity and training met the highest standards.

It is the opinion of California Public Guardians that the greatest majority of cases of neglect and abuse occur in the area of private

conservatorship. Further, it is felt that due to our relative high visability and presence in the community, we are frequently called upon by many agencies, such as law enforcement, Adult Protective Services and many of those same agencies which are at other times our watch dogs, to step into a critical situation to protect a disabled or elderly person and to resolve the financial and personal duress that created that crisis. Our perception of our ability to provide services to those for whom conservatorship is the best alternative is one of confident, sensitive professionalism and we think our public image and reputation is consistent with that opinion.

Increasingly, as programs for senior citizens are strengthened and expanded across this country, and especially in California, County Public Guardians are more aware that programs which help divert elderly citizens from conservatorship are available. This is essentially true because the federal and state governments have increased funding to programs which provide alternatives to conservatorship. An interesting phenomenon here in California is the growing number of partnerships in which County Public Guardians in concert with senior citizen groups are providing money management services to senior clients in an attempt to provide a needed service while diverting a more formal need for legal conservatorship. We think, and rightfully so, that County Public Guardians in California may be the best judges as to who should be diverted and how to divert clients from the conservatorship program. We consider ourselves to be a strong ally of the elderly and disabled in our communities and not a bureaucratic, insensitive agency out to "Big Brother" its county's citizens.

One very important point that we would like to make your subcommittee aware of is the fact that the existence of County Public Guardians does not depend upon the generation of fees from the estates of its clients. Generally, the salaries and operational expenses of the offices are funded by County general fund monies and from State Mental Health (Short-Doyle) funds. Further, County Public Guardians are bonded County officials. The point to be made is that this somewhat stable funding base helps to protect conservatorship clients from potential abuse, such as often happens in private and other types of conservatorship programs. It also helps to provide for the continuity and stability of the office of County Public Guardian that makes the office a strong community resource.

This discourse is in no way intended to mislead your committee members into believing that we feel our system is perfect. We all, through our own Association and now, hopefully, through a National Guardianship Association, strive to increase our capability to provide the highest and best level of service to those clients of ours for whom, for whatever reason, conservatorship is the best alternative.

The California Association of Public Guardians appreciates the opportunity to provide this information to your distinguished subcommittee. We, further, appreciate the efforts of your staff to research and compile important data on this topic. Obviously, and sincerely, there is no organization more interested in this dialogue and its outcome than this Association. We would be most grateful if, at the conclusion of your hearings, we could be provided with a transcript of the testimony so that we may analyze it to assist us in strengthening our own programs here in California.

Mr. Chairman, this Association stands ready to assist your subcommittee in any way possible and will gladly provide further information or testimony. We commend the subcommittee for its efforts to better understand an issue that is of vital concern to all citizens and most especially to us. Should your subcommittee decide to hold further hearings across this country, our Association would be privileged to host such a hearing in California.

Thank you for your consideration of this information.

Sincerely,

Joanne Ringstrom, President
California State Association of
Public Guardians/Conservators

Stan L. Dixon
Executive Board
California State Association of
Public Guardians/Conservators

APPENDIX III

From Elder Abuse and Neglect: Causes, Diagnosis, and Intervention Strategies, by Mary Joy Quinn and Susan K. Tomita

Conservatorships and Guardianships

Conservatorships are called guardianships in many states. Some states have both conservatorships and guardianships: the first is for the purposes of handling a client's estate and the second is for the purposes of handling a client's personal affairs and/or estate. Appendix G contains a letter to newly appointed conservators. In some states there are only conservatorships when referring to adults in need of assistance and other states have both. For purposes of simplicity, in this text the terms "guardianships" and "conservatorships" will be used interchangeably.

Conservatorships or guardianships have not always enjoyed good press or public relations. In truth, it has been the alternative of first choice in too many situations that might have yielded to a less restrictive legal option if only there had been someone available to serve and if the client had been capable of giving consent. There are several reasons why conservatorships have been used as the "solution" to the unmet needs of a dependent adult. One common reason for resorting to conservatorships is the lack of awareness of other legal options available for handling the finances and personal affairs of an individual. Another reason may be convenience, that is, time may be pressing and the nursing home wants a "responsible party" to sign a client in and to make sure that the bills get paid. In one city some nursing home operators for a time tried to insist that everyone who was admitted to their facilities should be under conservatorship. Another reason for turning to a conservatorship may be necessity. A very sick and confused person in an acute care ward of a hospital who is unable to handle her affairs may require a conservatorship. There is no way of knowing whether her physical health and mental status will return to baseline functioning. After a conservatorship is established, the patient may improve considerably and she may no longer require a conservatorship, at which point the conservatorship may be terminated.

Time-pressing matters may also create the need for a guardianship. Perhaps the finances are being dissipated by a person who is in the manic phase of a manic-depressive illness and there is concern about protecting the bank accounts so that money will not be lost entirely. Last, most people know that a guardianship is under court supervision and guardians are bonded. This can be very reassuring. However, the quality and quantity of court supervision may vary from county to county. Just as practitioners are learning to discard nursing home placement as the only way to take care of physically and mentally frail elderly, so the practitioner must learn to think of using legal devices other than guardianship.

Why have conservatorships been viewed so negatively by some professionals involved with the elderly? There are many good reasons, and some states have moved to revise their laws incorporating the objections of civil libertarians, whose main focus is the preservation of due process protections. A main objection is that in many states, a medical or psychiatric diagnosis alone can make an adult eligible for a conservatorship, no matter how well the individual is functioning and taking care of her personal and financial needs. Thus, if a person carries the label schizophrenic, she could be subject to a conservatorship. Similarly the term "old age" is still incorporated in many state laws as a sole reason for needing a conservatorship. Some have called that ageist. Functional ability should be the criterion for a conservatorship, that is, the ability to manage financial resources and to provide for personal needs, such as food, clothing, shelter, and medical care. Another objection has to do with the global concept of "incompetency." In most states, incompetency means that the conservatee or ward can do nothing for herself. The conservator or guardian is in total control. It has been argued that conservatorships should be tailored to assist the individual only in the area(s) where there are difficulties. There should be flexibility and the elder should be allowed control over those areas where she is capable of making decisions. Another cited difficulty is that court proceedings for appointing a conservator are sometimes too informal, that they are done without due process protections for the proposed conservatee or ward, or that all the

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requirements for notice to a proposed conservatee or ward are not strictly followed. For instance, a proposed conservatee may never be informed of an impending conservatorship or be discouraged from attending the proceedings when she is capable of doing so. Thus, unless she has hired an attorney to represent her, which is highly unlikely, there may be no opportunity for the proposed conservatee to put forth her position. Another objection is the expense involved in setting up the conservatorship. There are fees and costs which can range from $700.00 to $2,000.00, depending on the problems involved in the case.

Courts are prejudiced in favor of granting guardianships, not denying them. Families and relatives, the usual heirs to an elder's estate, are viewed more favorably by the law as proposed guardians than are friends and strangers, even though there may be obvious conflicts of interest. For example, the guardian may not want to spend money for the ward's care and support because she is preserving the estate so that she will inherit as much as possible. On the other hand, there may be no one else available to serve as the guardian, and it may be the wish of the proposed ward that this particular individual serve. When a spouse or relative is unable to serve, the court has the ability to appoint others to serve as guardians. Some states have public guardians and/or nonprofit corporations that fulfill certain criteria to serve as guardians. Professional people and agencies are increasingly serving as guardians and now are able to earn a living at being professional guardians. The court sometimes holds a professional guardian to a higher standard than a family member who may not have the opportunity to know resources and agencies.

Reforms of Conservatorship and Guardianship Laws Those who are concerned with the way the laws read regarding conservatorships and guardianships propose several reforms, many of which are embodied in the recent revisions of some states. For example, in California, the concept of conservatorship was created to eliminate what was felt to be the stigma of guardianships where a person legally was labeled an "incompetent" or an "insane person." Now an individual under a conservatorship is simply termed "conservatee." A guardianship now applies only to children. There are no findings of incompetency and the law looks strictly to functional abilities, not diagnoses, to determine the need for a conservatorship. The term "old age" does not appear in the text of the law. A conservatee retains certain rights unless the court makes specific determinations. These are the right to vote, the right to handle any earnings, the right to have an allowance, the right to marry, and the right to make medical decisions. Although the law may not be as flexible as some would like, there is an obvious attempt on the part of the legislature to allow judges to tailor the conservatorship to the conservatee.

With changes in the conservatorship law came the role of the court investigator. In California, each of the 58 counties has a court investigator, with the larger counties having more than one investigator. The investigator is responsible to the judge he serves and must make reports on proposed conservatees and supervise existing conservatorships on a regular basis. The investigator generally sees a proposed conservatee prior to the appointment of a conservator, one year thereafter, and then every two years. The investigator also responds to complaints from conservatees or others, including practitioners in the community. The investigator follows up on problem situations such as elder abuse and neglect, makes recommendations to the judges, and informs conservatees and proposed conservatees of their legal rights. For instance, those who are subjected to a conservatorship have the right to attend the hearing, protest the establishment of a conservatorship, ask for someone other than the proposed conservator to be her conservator, and have legal representation. If the court investigator thinks an attorney is needed to protect the rights of the proposed conservatee, the investigator can make that recommendation to the judge, who then will appoint an attorney.

On review of the conservatorship, the investigator determines whether the conservatorship is still needed, and if not, assists the conservatee in obtaining a termination of the conservatorship. Previous to the existence of investigators, conservatees usually were unaware that termination was a possibility. The court investigator represents the judicial system's best attempt to humanize situations that are difficult for all concerned. Appendix G contains more information on conservatorships in California.

Utilizing Guardianships or Conservatorships Conservatorships or guardianships are not always imposed involuntarily. In fact, most are uncontested. An individual can nominate anyone she chooses to serve as a guardian prior to the need for a guardianship. She may state, in writing, that should she become incapable of handling her own affairs she would like a specific individual appointed as her guardian. Thus, some self-determination is possible. Some states have conservatorships which pertain to involuntary mental health commitment and are distinctly different from traditional probate conservatorships.

When should a practitioner consider a conservatorship for a client? First the practitioner must make sure that the code requirements are met by the individual whom the practitioner wishes to conserve. Generally speaking, now that other legal devices are available, a conservatorship should be used only when another device will not do the job adequately, i.e., more protection is needed, or the elder has become too impaired to sign a power of attorney, or third parties such as banks, brokerage houses, and title companies will not recognize a power of attorney but will honor conservatorships. A conservatorship may be a way of permanently blocking an abuser from access to an elder's financial assets. It can also be valuable when there are a number of adult children and only one or two want to be involved with the parent. The fact that the court records are public and can be examined by the other children at any time may serve to avert family feuds. Conservatorships are also advised where there are substantial assets so that the person managing those assets is bonded. Many older persons want conservatorships because they know there is court review. Prospective conservators may welcome a conservatorship for the same reason. Some states have written instructions to conservators outlining their responsibilities (see Appendix G). A conservatorship is appropriate for someone who needs help and objects to help but clearly lacks the capacity to carry on for herself. In fact, although civil libertarians see conservatorships as always involuntarily placed over unwilling subjects, most older people do not object to a conservatorship. Many welcome it and feel relieved that they do not have to be responsible for their affairs or that, at last, help is available. Some elderly people know that they are losing capacity to handle their affairs.

Depending on her capabilities, a person under a guardianship may lose civil rights such as (1) the right to manage property, or personal and financial affairs, (2) the right to contract, (3) the right to vote, (4) the right to drive, (5) the right to choose a residence, and (6) the right to refuse or consent to medical treatment. Removal of such rights is a very serious act, and the practitioner should recommend to the court the removal of as few rights as possible.

For expediency, some states have forms available for medical practitioners to fill out which indicate the client's functional ability. Other states ask that physicians comment only on whether or not the client is physically able to be present in court since the criterion for conservatorship is the client's functional ability and not her medical diagnosis. For states in which medical letters are currently required, it is important that the medical practitioner write a letter which includes a functional assessment of the client.

In some states a special guardianship or a limited guardianship is available for a specific situation. For example, if a proposed ward is in need of emergency surgery and is not able to consent to surgery and no next of kin can be found, a limited guardianship may be initiated by an agency or hospital attorney. A limited guardianship automatically terminates after the specified intervention is completed or on the predetermined date.

The shortcomings of a conservatorship must be mentioned. For states in which the ward or conservatee is still labeled "incompetent," the psychological ramifications of being stigmatized with such a label may be considerable. The public and open nature of the proceedings can also be a disadvantage. The proposed ward may feel humiliated and on the "hot seat." Conservatorships in states with no court investigators as described in this section generally are not fully monitored by the court system. Although a termination of a conservatorship is possible, it is very difficult to effect, especially when the ward or conservatee is unaware that she is being abused or neglected (*Guide*, 1981). If a conservator is found to be abusive of her privileges, anyone may ask to modify or terminate the conservatorship. Terminating a conservatorship requires returning to court for a hearing, and this process must be coordinated. It is difficult for the conservatee to effect the termination by herself. It can be costly to hire an attorney to terminate the conservatorship except in states where there are public defender agencies willing to do the task.

Having discussed guardianships or conservatorships, the remaining items on the scale are civil commitment and prison. These are the most restrictive devices and they carry the most due process rights protections. These options are placed on the scale so that the practitioner can see the progression of deprivation of rights and have some idea of the meaning of due process protections.

CRIMINAL REMEDIES

While the least restrictive legal devices just described involve the civil section of superior court, criminal remedies involve the criminal section of the court. This means that the criminal justice system, including law enforcement agencies, prosecutor's offices, courts, jails, and prisons, are involved. In a criminal case, the victim is a witness, not necessarily the moving party in the case. It is the prosecutor's office or the government, not the victim, that decides whether or not a case will be brought to trial.

Working with the Police

A case involving the criminal justice system begins with a call to a law enforcement agency to request assistance. The standard emergency telephone number can be used to make a report. The practitioner can begin by identifying himself and giving the purpose of the call. A uniformed officer will be dispatched to take a report from the victim. It is preferable to speak to supervisors who are sergeants. They will probably have more experience in matters related to elder abuse and neglect. When possible, the practitioner should request that the client be interviewed by an officer in street clothes instead of a uniform. The uniform may intimidate the victim and prevent her from disclosing important information. After making the phone call, the practitioner should remain with the client at the scene of the incident to provide information to the officer and to be a source of support.

APPENDIX IV

STATEMENT OF

RECOMMENDED JUDICIAL PRACTICES

Adopted by the
National Conference of the Judiciary
on
Guardianship Proceedings for the Elderly

Compiled by Erica F. Wood

Sponsored by
The Commission on Legal Problems of the Elderly
American Bar Association
and
The National Judicial College

June, 1986

PREFACE

June 15-18, 1986, twenty-eight participants (including 24 probate and general jurisdiction trial judges) from across the country assembled at the National Judicial College in Reno, Nevada for a National Conference of the Judiciary on Guardianship Proceedings for the Elderly. Their objectives were to recognize and discuss the special concerns of older alleged incompetents and wards—for procedural due process, thorough and functional evaluation of medical/social evidence, decisions affording maximum autonomy, and sound, periodic guardianship review.

The conference was sponsored by the American Bar Association Commission on Legal Problems of the Elderly, in conjunction with the National Judicial College. It was funded by the Administration on Aging, U.S. Department of Health and Human Services, with supplemental monies from the Marie Walsh Sharpe Endowment. The participants were selected from states with the highest population and percentage of elderly. They were chosen as judicial leaders, and they brought to the session extensive knowledge, yet a willingness to learn and to change long-standing attitudes and procedures. This they coupled with a sense of excitement in attempting to constructively resolve the complex dilemmas facing judges in guardianship proceedings.

The conference was a beginning rather than an end. After two and one-half days of lectures, panels, discussion groups, films, plenary session debates and informal conversations, the participants voted to adopt the Statement of Recommended Judicial Practices which follows. It provides for the first time some national guidance to judges in confronting the problems of the growing number of elderly who may need assistance in managing their property, personal affairs or both.

Hopefully, the conference and its recommendations will spur judicial educators and associations to sponsor similar sessions at the state level; encourage necessary changes in statutes or court rules; foster closer coordination between the judicial and aging systems; and urge judges to test the tenets in their own courtrooms.

John H. Pickering
Chairman
ABA Commission on Legal Problems of the Elderly

Commission Members

John J. Regan, Vice-Chair
Jacqueline Allee
Sara-Ann Determan
Arthur S. Flemming
Burton Fretz
Rodney N. Houghton
Edward F. Howard
Harold R. Johnson
Joanne Lynn, M.D.
Robert S. Mucklestone
Douglas W. Nelson
Samuel Sadin
James M. Shannon
Daniel Skoler

Guardianship represents a drastic loss of fundamental civil rights. The judicial practices recommended by the National Conference of the Judiciary on Guardianship Proceedings for the elderly stress the importance of assuring maximum autonomy to elderly wards while still providing the assistance they need.

Deeply rooted societal myths and stereotypes about older people have long permeated the guardianship process. In some states it has been the practice to appoint a guardian based on the advanced age of a person, regardless of that person's ability to function.

The court has the ultimate responsibility for determining incompetence and for monitoring a ward's condition and continuing need for guardianship. A key recommendation of the Conference is that judges handling guardianship cases be adequately educated at local, state and national programs as to the powers of the court and about the aging process and the myths and stereotypes of aging.

The National Judicial College is proud to be a sponsor of this Conference and to grow in our own learning about the aging process.

John W. Kern, III
Dean of the National Judicial College

INTRODUCTION

Older persons subject to guardianship proceedings face a traumatic experience. They may find the process frightening and difficult to understand. Because of their age, they may be perceived as lacking the ability to make their own decisions or explain their own problems. An adjudication of incompetency represents a dramatic intrusion on their basic civil liberties. Guardians appointed to care for them may lack the necessary background or be unaware of community resources.

We as judges and other court related professionals from twenty-six states recognize the serious implications of guardianship proceedings for the elderly. We have concluded that steps can be taken to ensure due process protections for elderly respondents without making the process overly time-consuming or cumbersome. We are aware that societal perceptions of aging may affect the guardianship process, and have resolved to guard against this. We affirm the need to maximize the autonomy of the elderly ward, using the least restrictive alternative appropriate for his/her particular needs. We recognize that courts and public/private service agencies, including the network created under the Older Americans Act, should be involved in a joint effort to ensure that necessary services are available and that practical problems are resolved.

Thus, we have set forth a series of recommended judicial practices in the area of guardianship. Although they are specifically focused on the elderly, most of the recommendations would also be useful for other disabled respondents and wards. In drafting the recommendations, we have sought to describe the optimal proceedings, but are aware that cost may be a factor in implementing some of these changes. We believe our recommendations will greatly benefit the elderly and will assist in safeguarding their rights while providing for their needs.

RECOMMENDATIONS

I. PROCEDURE: ENSURING DUE PROCESS PROTECTIONS

A. Notice to the Alleged Incompetent

1. Personal service upon respondent should be by a court officer in plain clothes trained in dealing with the aging. In addition to the respondent, notice should be given by mail to the spouse, all the next of kin, the custodian of the respondent, the proposed guardian, and the providers of service.

2. There should be at least fourteen (14) days' notice before the hearing unless the court otherwise orders.

3. Notice should be in plain language and in large type. It should indicate the time and place of hearing, the possible adverse results to the respondent (such as loss of rights to drive, vote, marry, etc.), and a list of rights (such as the right for court-appointed counsel or guardian ad litem.) A copy of the petition should be attached.

B. Presence of the Alleged Incompetent at the Hearing

1. Respondent has a right to be present and should be present if at all possible.

2. The court should do everything possible to encourage access to the courts by the elderly, including making the court facilities accessible and training court staff as to available services and resources. However, this shall not diminish the court's ability to convene at any other location if in the best interest of the respondent.

3. To make participation of the respondent and others as meaningful as possible, courts should make all possible resources available for impaired persons, including interpreters for the deaf and non-English speaking persons, and visual aids.

C. Representation of the Alleged Incompetent

1. Counsel as advocate for the respondent should be appointed in every case, to be supplanted by respondent's private counsel if the respondent prefers. If private funds are not available to pay counsel, then public funds should be used, not to exceed the rates ordinarily paid to court appointed counsel.*

2. Counsel for the respondent should make a thorough and informed investigation of the situation. After accomplishing the investigation, counsel should proceed to represent the respondent in accordance with the rules of professional conduct governing attorneys of that state.

II. EVIDENCE: APPLYING LEGAL STANDARDS TO MEDICAL/SOCIAL INFORMATION

A. Assessment of Medical Diagnosis of the Alleged Incompetent

1. The court has ultimate responsibility to assess medical evidence and to determine incompetence. A doctor's input should be required but a doctor's medical diagnosis should not be the sole criterion for a court's adjudication of incompetency.

2. Respondent has a right to cross-examine the physician, but a physician's letter or affidavit may be admitted if stipulated to by the respondent. The respondent, or the court on its own motion, has the right to ask for an independent evaluation by a physician or other mental health or social service professional.

B. Use of Investigative Resources to Assist the Court

1. The court should have guardians ad litem, visitors or court investigative agencies available to it to investigate the respondent's situation and condition.

2. The investigator's report should cover the issues of incompetence, who should be guardian, placement of respondent, services available, and an assessment of less restrictive alternatives to the creation of a guardianship. The report should be made available to the court and all counsel.

3. Investigators should be professionally trained and familiar with the problems of the elderly.

C. Advanced Age of the Alleged Incompetent

1. "Advanced age," in itself, should not be a factor in determining incompetence.

2. Judges handling guardianship cases should be educated at local, state and national programs about the aging process, and the societal myths and stereotypes of aging.

III. COURT ORDER: MAXIMIZING AUTONOMY OF THE WARD

A. The court should find that no less restrictive alternative exists before the appointment of a guardian.

B. A scheme for limited guardianship and limited conservatorship should be provided, preferably by statute. Courts should always consider and utilize limited guardianships, as an adjunct of the application of the least restrictive alternative principle, either under existing statutory authority or under the court's inherent powers.

IV. SUPERVISION: ENSURING THE EFFECTIVENESS OF GUARDIANSHIP SERVICES

A. Submission and Review of Guardian Reports

Guardians should be required to make a periodic report as to the ward's present condition and the continuing need for a guardian, either limited or plenary. Courts should review such reports and take appropriate action with regard thereto. A system of calendaring such reports should be established to ensure prompt filing, with sanctions provided for failure to comply.

B. Training of Guardians

The court should encourage orientation, training and ongoing technical assistance for guardians, including an outline of a guardian's duties and information concerning the availability of community resources, including the aging network, and information about the aging process.

C. Use of Guardianship Agencies

When there is no suitable person to act as guardian, the court may utilize any public, private or volunteer office or agency to so act. Such guardians should be expected to observe the same standards of performance required of private guardians, and should not be an employee of the court.**

ALTERNATIVE POSITIONS:

* An alternative view, adopted by a minority of the conference, was that the following paragraph should be added to section I(C)1:

A guardian ad litem, who is an attorney, should be appointed initially in all incompetency proceedings. The guardian ad litem's duty is to explain to the respondent the rights of the respondent and the meaning of the proposed hearing. The guardian ad litem must report back to the court, in writing, the results of the interview with the respondent with respect to the respondent's physical, mental and financial condition. The report should also state whether a guardian should or should not be appointed.

** An alternative view, adopted by a minority of the conference was that section IV(C) should read as follows:

Use of Guardianship Agencies

When there is no suitable person to act as guardian, the court may utilize any public, private or volunteer office or agency to so act. Such guardians should be expected to observe the same standards of performance required of private guardians, and should operate independently of the court and other social service agencies.

Issue I.A.

Notice to the Alleged Incompetent

Issue I.A.(1)

To what extent should the court require actual service on the alleged incompetent, as well as notice to relatives, whenever possible?

Background

Statutes in forty-two states and the District of Columbia require that the proposed ward be contacted regarding the filing of a guardianship* petition and the date set for a hearing (Parry, Table 7.3**). The Uniform Probate Code provides for notice at Sec 5-204. However, several states allow for considerable judicial discretion. According to Brakel, Parry & Weiner in The Mentally Disabled and the Law, statutes in 3 states are silent regarding notice; one provides for notice to relatives and others but does not specify the alleged incompetent; another provides for notice to "interested persons designated by court rule;" still another provides for notice to the alleged incompetent "unless the court orders otherwise"; one specifies notice to the individual "if in an asylum" (Parry, Table 7.3). In such instances, it would appear that assuring actual service whenever possible is a matter of elemental fairness. One legal scholar has observed that

> "A fundamental respect for procedural values requires that adequate notice of the guardianship hearing be given to the alleged incompetent." (Frolik, p. 637)

Indeed, some courts have found that notice to the respondent is a requirement of constitutional due process. In Re Hruska's Guardianship, 298 NW 664 (Iowa 1941); Tapnell v. Smith, S.E. 2d 875 (Ga. Ct. App. 1974); Shanklin v. Boyce, 204 S.E. 187 (Mo. 1918)

Even if notice is required, however, it may be waived. Many state statutes are silent on the question of waiver of notice to respondent, allowing judges leeway to permit frequent waivers or even constructive waivers of service of process. But a number of other states provide that waiver is ineffective unless the proposed ward is present at the hearing or the

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*The term "guardianship" in the background statements refers to both guardianship of the person and guardianship of property, unless otherwise indicated.

**Full citations to articles and books referenced in the issues background statements appears in the Bibliography included in these materials.

waiver is confirmed by a visitor. The Uniform Probate Code specifically prohibits waiver of notice (Sec. 5-304(d)). Appeals courts in Texas (Dyer v. Walls, 645 S.W. 2d 317 (Tex. Ct. App. 1982) and Ohio (In Re Guardianship of Corless, 440 N.E. 2d 1203 (Ohio Ct. App. 1982)) have required that actual service must be completed before the court may maintain jurisdiction over the proposed ward.

Such service might be accomplished in a variety of ways ranging from personal service in hand to publication or posting of notice. Given the possible limitations of the alleged incompetent, service of process in hand would appear to increase the likelihood that he/she would take note of and respond to the proceeding. The Uniform Probate Code requires that the proposed ward be served personally if he or she can be found within the state (Sec. 5-304(c)). The Pre-conference Survey* indicated that personal service in hand was made in almost all of the participating jurisdictions. However, a 1985 study of guardianship practices in Maine showed that

> "in a very significant number of cases, service of the papers which give the alleged incompetent person notice of the proceedings is not made in hand." (Maine Legal Services for the Elderly, p. 7).

Finally, notice to relatives and other interested parties in addition to the alleged incompetent is important, allowing them to provide the court with further information on which to determine competency. The Uniform Probate Code and a large number of states require notice to a variety of relatives and/or the person with care and custody of the individual. The Maine study, however, found that in 57% of the cases, either no other person was given notice, or notice was waived. (p. 8)

*Twenty-one question survey of current judicial practices of conference participants, 28 responses, April-May 1986.

Issue I.A.(2)

Should the court assure that notice to the alleged incompetent allows sufficient time to prepare a meaningful defense?

Background

Absent an emergency situation such as consent to immediate surgery, it would seem that notice should allow the alleged incompetent, family members, legal counsel, or other interested parties the opportunity to marshal arguments challenging the basis for the petition. The Uniform Probate Code requires that notice be given at least 14 days in advance of the hearing (Sec. 1-401(a)); and states which specify a time range between three and 20 days before the hearing. But some 23 states are silent on the timeliness of notice (Parry, Table 7.3). The Pre-conference Survey indicated the "average time between notice and hearing" ranged from 7 to 90 days, with an average of 20 days. A study of guardianship cases in Leon County, Florida, between 1977-1982 showed that "in 29% of cases surveyed, the court scheduled hearings within a week of the petition." (Peters, Schmidt and Miller, 1985, p. 535).

Issue I.A.(3)

Should the court assure that notice to the alleged incompetent conveys as well as possible what is at stake and what rights he/she has in defense?

Background

Timely notice to the alleged incompetent is of no use if he/she cannot understand it. Yet in many cases, notice is an order to the proposed ward to appear in court and show cause why he or she should not be judged incompetent. The notice may be in small type and/or in language which the alleged incompetent may not readily understand. Moreover, the notice may allege incompetence according to the statutory requirements (or attach a copy of the petition), but often contains no specific facts which might link the proposed ward to these conditions.

In some cases, the notice fails to inform the proposed ward of the gravity of the proceeding or its consequences (Horstman p. 240 and Mitchell, p. 453). In the Pre-conference Survey, 65% of respondents indicated the notice does not inform the alleged incompetent of any rights which may be lost. Additionally, there is often little information on the upcoming hearing and how best to respond. Fifty-two percent of Pre-conference Survey respondents reported the notice used in their jurisdiction does not contain information on rights during the hearing process, such as the right to present evidence and cross-examine witnesses. Indeed, one source comments that the alleged incompetent --

> "will not be advised of the serious legal and personal implications of the determination to be made, the importance of countering the allegations, the standard by which competency will be judged, the evidence to be introduced, or rights to legal representation or a jury trial, even if the latter is guaranteed by the statute." (Mitchell, p. 453)

A constitutional argument has been advanced that this type of notice is not sufficient to provide due process protection (Horstman pp. 237-241). In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the Supreme Court established the principle that the type of notice adequate to meet constitutional due process requirements can only be determined by the individual circumstances of the proceeding. It must be "notice . . . appropriate to the nature of the case," and "the means employed must be such as one desirous of actually informing the absentee might reasonably adopt. . ." Citing Mullane, the Court held in Covey v. Town of Somers, 351 U.S. 141 (1956) that regular notice by mail to a "known incompetent" concerning foreclosure of tax liens on real

property was inadequate, since the individual was unable to understand the nature of the proceedings. And in Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), a three-judge federal court, in a civil commitment context, found that:

> "[n]otice of date, time and place is not satisfactory. The patient should be informed of the basis for his detention, his right to jury trial, the standard upon which he may be detained, the names of examining physicians, and all other persons who may testify in favor of his . . . detention, and the substance of their proposed testimony" (349 F. Supp. at 1092)

Whether similar constitutional requirements would apply in guardianship cases is not clearly established, but fairness to the alleged incompetent would appear to require more than "a mere gesture" toward conveying a meaningful opportunity to be heard. This might be accomplished, for example, through changes in the notice form; a brochure describing simply the hearing procedure and the rights of the alleged incompetent; and/or having a court-appointed visitor or the person who serves process communicate the information orally, in a standard explanation.

Issue I.B.

Presence of the Alleged Incompetent at the Hearing

Issue I.B.(1)

Under what circumstances should the court waive the presence of the alleged incompetent?

Background

The proposed ward's presence in court is mandatory in 15 states; and there is also a general right to attend competency hearings in 24 states (Parry, p. 381 and Table 7.4), and in the Uniform Probate Code (Sec. 5-303(c)). But many states allow the court to dispense with that requirement in the "best interest" of the alleged incompetent . A doctor's letter or affidavit stating that appearance in court might be harmful "usually is enough to induce the court to waive the person's attendance" (Regan & Springer p. 38). One source concludes that in some jurisdictions, excusing the proposed ward's attendance has become a "routine" practice (Mitchell, p. 454).

Many commentators (Regan; Horstman; Frolik; Mitchell; Alexander & Lewin) have noted that in practice, the alleged incompetent is seldom present at the hearing. A one-year study of 1010 guardianship and conservatorship filings in Los Angeles in 1973-74 by the National Senior Citizens Law Center showed that in 84.2% of the cases, the only persons present at the incompetency hearing were the judge, the petitioner and the petitioner's attorney (described in Horstman, n. 81). In the Pre-conference Survey, 44% of respondents indicated the alleged incompetent was "seldom" present.

Courts have the responsibility, then, to evaluate the circumstances of each case with a view toward balancing avoidance of trauma for the alleged incompetent with preservation of his/her right to be directly involved in a proceeding determinative of fundamental rights. The presence of the alleged incompetent could be extremely useful to the court in allowing it to judge for itself the level of mental incapacity. If a court appearance would seriously disturb the person, an interview might be arranged in the judge's chambers or some less threatening environment (Parry, p. 381). See Issue I.B.(3) below.

Issue I.B.(2)

What should be the court's role in encouraging access by elderly alleged incompetents to the courthouse?

Background

Many elderly alleged incompetents may live alone, may lack transportation, may not know where the courthouse is or how to get there. Others may reside in nursing homes, board and care homes or senior housing facilities, and may seldom leave the premises. Through discussion with local social and protective services workers and with the area agency on aging, judges could determine whether access is indeed an obstacle to participation by alleged incompetents, and could seek positive solutions. For example, in some areas, the agency on aging funds -- or at least is aware of -- transportation systems for the elderly, which could perhaps be expanded to include use by alleged incompetents for court appearances. Or the area agency may be able to generate a volunteer program for driving proposed wards to court, and accompanying them to the proper courtroom. Since alleged incompetent persons -- and often older persons in general -- may find involvement in court procedures an unfamiliar and confusing experience, such volunteers could help to alleviate fears and provide support.

Further, since some elderly proposed wards have physical disabilities, the courthouse and courtroom should be safe and accessible to the handicapped. Since many are frail and tire easily, waiting time should be minimized, and comfortable waiting areas available.

Of course, many alleged incompetents are not mobile, and are simply unable to participate in a court appearance. If they are willing, a telephone interview might provide helpful information to the court, and allow them the opportunity to personally voice their perspective.

Issue I.B.(3)

How can the court make participation of the alleged incompetent as meaningful as possible through special communication techniques?

Background

The allegation of incompetency can be an insulting and stigmatizing occurrence -- particularly for older persons who may already be coping with changes in status and self perception, as well as the social, familial, physical and financial losses which often accompany the aging process. Further, participation in the judicial system can be bewildering and intimidating. Tensions of an elderly proposed ward might be reduced by allowing and encouraging him/her to be accompanied by a supportive individual. Guardianship procedures and its consequences should be explained simply. Establishing eye contact and generally showing respect and interest in the alleged incompetent will enhance communication. Extra time and patience may be required to get his/her full response. Paraphrasing provides an accuracy check, and at the same time gives the person a feeling of support from being understood (ABA, Effective Counseling. . ., p. 8 & generally).

In addition, the court should recognize and respond to the sensory losses that are often a normal part of the aging process. While hearing loss should not be assumed, it is frequently experienced by older people. Those with hearing impairments find it difficult to understand someone who talks quickly, indistinctly, or in a setting where there is excessive background noise (The National Council on the Aging, The Sixth Sense, p. 2). To compensate for hearing loss, the speaker should: eliminate background noise; enunciate clearly; announce especially important points or changes in the discussion; and sit so the individual can watch lip movements. (NCOA, pp. 6-7; ABA, p. 5)

Many older people do not see as well as they used to. The lens of the eye changes with aging. The elderly are often more sensitive to glare, have trouble going from bright light to darkness, and do not function well in low light levels. To compensate for vision loss: assure that lighting is sufficiently bright, but diffuse; avoid having the individual face a source of glare, such as a window; double or triple space written materials or use large type; and assure that courthouse signs use large and well-spaced lettering (NCOA, pp. 1-2, 5-6; ABA, p. 5).

Issue I.C.

Representation of the Alleged Incompetent

Issue I.C.(1)

Should the court appoint counsel for alleged incompetents who would otherwise be unrepresented?

Background

All states allow an alleged incompetent to be represented by counsel at his/her own expense. (Dudovitz, p. 85; Parry 382 and Table 7.4) However, if the person is unrepresented, states vary as to court appointment of counsel. Some states, such as Missouri, require appointment. Some require appointment if the proposed ward requests counsel or fails to reject an offer of counsel. In other states, it is within the discretion of the court. Some 36 states make a guardian ad litem available either in every case or where necessary. (Parry, p. 382) The Uniform Probate Code provides:

> "unless the allegedly incapacitated person is represented by counsel, [the Court shall] appoint an attorney to represent the person in the proceeding. The person so appointed may be granted the powers and duties of a guardian ad litem." Sec. 5-303(b)

Legal scholars (Horstman, pp. 244-251; Dudovitz, p. 85) have argued that the alleged incompetent is constitutionally entitled to legal representation, and to appointment of counsel if he/she is unable to retain one. They compare the guardianship proceeding and its potential for the loss of personal rights and liberties to juvenile delinquency proceedings. The Supreme Court, in In Re Gault, 387 U.S. 1 (1967) held the right to appointed counsel, as well as other criminal procedural due process safeguards, applicable to juvenile delinquency proceedings. Federal courts have also held the right to counsel applicable to civil commitment proceedings. See Lessard v. Schmidt, 349 F. Supp. 1978 (E.D. Wisc. 1972) and Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976).

However, in Rud v. Dahl, 578 F. 2d 674 (7 Cir. 1978) the court held that counsel was not required for an alleged incompetent in a guardianship proceeding because "the nature of the intrusion on liberty interests resulting from an adjudication of incompetency is far less severe than the intrusion resulting from other types of proceedings in which the presence of counsel has been mandated." 578 F. 2d at 679. The court also noted that the technical skills of attorneys are less important in incompetency hearings because they are more informal than other civil and criminal hearings.

Studies have shown that in practice, alleged incompetents are often unrepresented, sometimes in spite of statutory mandates. For example, the Florida statute requires the appointment of an attorney if the alleged incompetent cannot afford one; and the Florida Supreme Court has held that

> "a trial judge must specifically find whether or not the alleged incompetent is represented by counsel in any hearing where incompetency is to be determined, and whether or not counsel should be afforded. Failure to make such a finding constitutes reversible error." In Re Guardianship of Paunack (1978) (Peters, Schmidt and Miller, p. 535)

However, a study of guardianship cases from 1977-1982 in Leon County, Florida found that in only 57% of cases did court records show attorneys appointed on behalf of alleged incompetents. (Peters, Schmidt and Miller, p. 535) The 1985 Maine study found that statewide, only 3% of alleged incompetents were represented by counsel. (Legal Services for the Elderly, p. 9) In the Pre-conference Survey, 67% reported the alleged incompetent was "always" or "usually" represented by counsel, and 33% reported representation "sometimes" or "seldom." While almost all respondents reported court appointment of counsel for alleged incompetents unable to retain private counsel, over two-thirds offered it automatically and less than one-third upon a specific request.

Issue I.C.(2)

What should be the role of attorneys representing alleged incompetents?

Background

Two views exist on the role of an attorney representing an alleged incompetent. According to the "best interest" model the client may be confused, medicated, unable to articulate his/her wishes, or not in touch with "reality." Thus, the attorney must make a judgment about what is in the best interest of the client, and represent the client according to that judgment.

Critics argue that determining what is best for the client is the role of a guardian ad litem, and that the role of counsel is to "serve as zealous advocate of the legal interests of [the] client, but not to determine those interests." (Sales, Powell, Van Duizend and Associates, p. 538). They maintain the attorney should take the traditional attorney's role as in other contexts, advocating the client's needs as the client sees them, and allowing the court to make the decision about the need for guardianship after aggressive advocacy on both sides. This reflects the ABA Model Rules of Professional Conduct, which state that

> "When a client's ability to make adequately considered decisions in connection with the representation is impaired . . . the lawyer shall, as far as reasonably possible, maintain a normal client-attorney relationship with the client." Rule 1.14

Proponents of the adversarial approach contend that if the attorney assumes the guardian ad litem role, several problems arise: (a) If counsel has determined in advance that the client needs "help," it is less likely that he/she will challenge expert testimony; (b) It is difficult to determine whether the client has been provided with "effective assistance of counsel" or to judge the quality of the attorney's efforts; (c) Counsel using the "best interest" approach may provide "only procedural formality to legitimize the routine approval of guardianship petitions;" and (d) Attorneys are unqualified to make decisions regarding the mental capacity, psychological needs and well-being of their clients. (Frolik, pp. 634-635) In arguing for the adversarial role, one source acknowledges:

> "The judge may not want this adversary model, rather preferring a cooperative informal atmosphere in which all the participants explore together what would be in the elder's best interest. However, history shows that a

> non-adversarial system may result in significant loss of rights by the individual being subjected to the proceedings." (Dudovitz, p. 79)

What happens, however, if the attorney looks to the client to determine his/her own interests, but the client is not capable of communicating any interest at all? The Uniform Probate Code provides that the attorney appointed to represent the proposed ward "may be granted the powers and duties of a guardian ad litem." (Sec. 5-303(b)) The model statute by the ABA Commission on the Mentally Disabled submits that with the UPC approach, attorneys "may be caught between conflicting interests and have difficulty maintaining objectivity and avoiding the subrogation of one role to the other." (Sales, Powell, Van Duizend and Associates, p. 539) Under the model statute, the two roles are clearly separated. The attorney, however,

> "may seek the appointment of a guardian ad litem . . . . [if the client] is unable to determine his or her interests without assistance . . . .In seeking the appointment of a guardian ad litem, the attorney will have to weigh the possible prejudicial effects on [the assertion that guardianship is unnecessary]." (Sales, Powell, Van Duizend and Associates, p. 598-599)

Finally, at least one source opposes having the attorney abide by the guardian ad litem's decision when the client cannot communicate his/her interests, as provided by the model statute, above. It contends that the attorney should as a matter of course defend the client against the imposition of guardianship, assuring argument on both sides, for an informed judicial decision. (Frolik, p. 635)

Issue II.A.

Assessment of Medical Diagnosis of the Alleged Incompetent

Issue II.A.(1)

What should be the role of the court in assessing the medical diagnosis of an alleged incompetent?

Background

The incompetency hearing generally includes a statement from a physician concerning the proposed ward's mental state and whether he/she meets one of the statutorily enumerated conditions for incompetency. While the petitioner frequently submits such statement, 34 states (Parry, p. 383 & Table 7.3) and the Uniform Probate Code (Sec. 5-303(b)) require a court-ordered examination and report.

A number of observers have found that these medical reports are often inadequate and "conclusory" (Frolik, p. 639). The 1985 Maine study reported that only 31% of physicians' statements studied contained specific information on the alleged incompetents' condition and limitations. The remainder were based on conclusory, unsupported statements; a recitation of statutory incapacity; or an assertion that the proposed ward was "senile, confused, forgetful" or "can't manage affairs." (Legal Services for the Elderly, Inc. pp. 13-16 and Table 10C) A study of guardianships in the Tallahassee, Florida area between 1977-1982 noted that "in about 90% of cases reviewed, examining committee reports did not provide specific behavioral information for the court." (Peters, Schmidt, Miller, p. 536)

Yet frequently, medical statements are dispositive of the incompetency issue and the need for appointment of a guardian. In the Pre-conference Survey 44% of respondents indicated the medical diagnosis is "usually" dispositive of the case (15% "sometimes, and 41% "seldom" or "never"). The Florida study (cited above) observed:

> "Findings appeared to be heavily influenced by psychiatric diagnoses. Judges did not depart significantly from these diagnoses or from the psychiatric determinations of incompetency rendered by the examining committee. Judges concurred with all 42 of the incompetency decisions and did not appear to solicit additional behavioral or psychiatric evidence regarding functional incompetence of the potential ward. In most cases, the diagnosis provided by the examining committee was reiterated verbatim by the court in adjudicating

incompetency." (p. 535)

When this occurs, the question of incompetency "becomes a medical rather than a legal question" (Horstman, p. 227). The court concentrates on medical labels rather than concrete, functional behavior of the proposed ward; and legal judgements give way to the opinion of medical experts. Moreover, some argue, these psychiatric labels "are based not on objectively verifiably physiological problems, but on subjectively defined behavioral abnormalities." (Horstman, p. 229) Indeed, a legal commentator on civil commitment states

> "Unlike the diagnosis of physical ailments. . .diagnosis of most mental conditions is a highly subjective procedure in which the clinician uses his own concept of normality to classify the behavior and emotions of his patients. . . ." (7 Loyola L. Rev., 93, 110-111 (1974))

In light of this, the court should not automatically assign undue weight to the medical diagnosis, but should balance it with information about the behavior and limitations of the proposed ward. Less weight may be due a conclusion of a general physician than that of a specialist -- and the opinion of a specialist should be assessed based on his/her actual training and experience. (Parry, p. 382-383). It might be particularly useful to the court to have the opinion of a gerontologist (see Issue II.B below). The court should encourage medical evaluations which include the causes, effects and severity of the proposed ward's condition, and should solicit additional information if necessary. A medical statement could best assist the court when it contains information about: (1) whether the physician has recently examined the proposed ward; (2) whether he/she has been treating the ward and how; (3) whether specific tests have been performed; and (4) any prognosis concerning the patient's future. A prognosis could be especially useful to the court in tailoring a limited or temporary guardianship where appropriate (See Maine study, p. 14). A court form requesting this type of information might be useful in encouraging more thorough medical statements.

Finally, a requirement that the petitioner state recent concrete evidence of functional inabilities of the proposed ward helps to balance and supplement any medical opinion. The Pre-conference Survey indicated this practice is generally followed in the responding jurisdictions. (Also see Issue II.B. below).

Issue II.A.(2)

Should the court admit hearsay evidence in the form of a physician's letter or affidavit, without giving the alleged incompetent the opportunity to cross examine the physician?

Background

The Uniform Probate Code provides the right "to cross-examine witnesses, including the court-appointed physician or other qualified person. . ." (Sec. 5-303(c)). However, many states do not provide for this right; and in practice, in incompetency hearings, hearsay evidence in the form of letters or affidavits from physicians is frequently allowed in lieu of direct testimony (Horstman, p. 252, Frolik p. 639, Mitchell, p. 454). But given the important -- often determinative -- nature of medical judgment, the opportunity for cross-examination of the physician is essential. An argument can be made that --

> "to admit hearsay evidence of an opinion dispositive of the ultimate issue may be to deny the proposed ward the procedural due process protection guaranteed by the fourteenth amendment." (Horstman, p. 253)

In Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972),* a three-judge federal court held that admission of hearsay evidence in a civil commitment proceeding violates constitutional due process requirements. A New York court has held that an incompetency determination leading to guardianship could not be based on a physician's affidavit even though all parties concurred. The issue of competency had to be presented before the court "as a triable issue of fact based on medical evidence" (Parry, p. 383). In re Von Bulow, 470 N.Y.S. 2d 72 (Sup. Ct. 1983).

Of course, if the alleged incompetent is represented by vigorous, adversarial counsel, hearsay objections to admitting a physician's statement will be made, and the opportunity for cross-examination will be pursued. Often, however, the alleged incompetent is without counsel (See Issue I.A.(3)), and is vulnerable to the use of hearsay evidence to determine the need for guardianship.

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*vacated and remanded, 414 U.S. 473 (1974), reaffirmed, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated and remanded, 420 U.S. 592 (1975), reaffirmed, 413 F. Supp. 1318 (E.D. Wis. 1976).

Issue II.B.

Use of Investigative Resources to Assist the Court

Issue II.B.(1)

What types of investigative resources can best provide the court with impartial information about the alleged incompetent?

Background

In order to decide the question of incompetency and need for guardianship, a trial judge must often rely on limited evidence, frequently uncontested, and frequently without direct observation of the proposed ward's behavior. Indeed, commentators have observed:

> "Probate court judges who decide guardianship cases labor under a terrible load. Criticisms. . . have been levelled against statutory wording and procedural weaknesses. The devastating potential of an incompetency adjudication also cannot be ignored. The judges encounter tremendous caseloads and can give only limited time to deliberations in each case. They may decide guardianship cases with an almost complete lack of evidence. . . .Finally, the decision is essentially a prediction of future behavior, a difficult task for anyone lacking prescience or even extensive training in the assessment of human behavior." (Nolan, p. 210)

> "A judge at a hearing to determine incompetency has a formidable task: He must pierce the atmosphere of emotional antagonism so often incident to such cases and evaluate the evidence. He must discern the existence and extent of mental disability, a task which may require him to pass judgement as an expert on the alleged incompetent's mental condition."

To assist judges in their deliberations, approximately 60% of American jurisdictions statutorily provide for an evaluation of the proposed ward (Sales, Powell, Van Duizend and Associates, 1979, p. 550, and Chart III). The Pre-conference Survey indicated that of the 26 jurisdictions responding, 19 use guardians ad litem, 12 use social service personnel, 2 use volunteer visitors, 5 use court appointed visitors, 14 use court appointed physicians, 2 use interdisciplinary teams, one specified a "court investigative

staff" and two did not use investigative resources. The Uniform Probate Code provides:

> "The person alleged to be incapacitated must be examined by a physician or other qualified person appointed by the court who shall submit a report in writing to the Court. The person alleged to be incapacitated also must be interviewed by a visitor sent by the Court." (Sec. 5-303(b)).

The guardianship model statute prepared by the ABA Commission on the Mentally Disabled (1979) provides that "the court shall appoint a multidisciplinary evaluation team." (Sales, Powell, Van Duizend & Associates, p. 550) It further specifies that a list of experts qualified to serve on such a multidisciplinary team would be prepared and monitored by a "Guardianship/ Conservatorship Oversight Commission" established in the model act.

Finally, the model protective services act and model guardianship act prepared for the U.S. Senate Special Committee on Aging (Regan and Springer, 1977) includes a "geriatric evaluation service" -- a team of medical, psychological, psychiatric and social work professionals to provide the courts with impartial, professional advice to assist them in making determinations (Regan and Springer, pp. 39, 62-63, 82).

Of course, cost is a factor in establishing such evaluation resources. The ABA model statute cited above places the cost on the court, to assure objectivity and avoid an inordinate burden on either the petitioner or alleged incompetent. The accompanying commentary reports that "most jurisdictions" providing for evaluation have the court bear the cost as well. (Sales, Powell, Van Duizend and Associates, p. 550) In the model statute prepared for the U.S. Senate Special Committee on Aging, the costs are to be borne by "the state agency responsible for community-based services to the elderly" (Regan and Springer, pp. 62-63). It could well be argued that an evaluation service, by recommending the least restrictive alternative for the proposed ward (see Issue II.B.(2) below), would assist in avoiding unnecessary institutionalization, and thereby could save the state money.

Issue II.B.(2)

What should be the duties of investigative personnel in providing impartial information to the court?

Background

Three related objectives could be identified for investigative personnel aiding the court. First, they could make an assessment of the alleged incompetent's condition, limitations and capacity to make decisions and maintain an independent life. This is further detailed by the ABA model statute to include "a description of the respondent's mental, emotional, physical, and educational condition, adaptive behavior and social skills," as well as a description of any services being used by the alleged incompetent (Sales, Powell, Van Duizend and Associates, p. 550). A unique article in the journal Law, Medicine and Health Care, entitled "Functional Evaluation of the Elderly in Guardianship Proceedings" (Nolan, 1984), advocates a particular evaluative technique. A "functional assessment," it explains, is well-known among human services personnel, and differs from others sorts of evaluations --

> "primarily in its focus on resulting behavior. The functional evaluator records the extent to which a subject carries out activities of daily living effectively. Thus, for example, when the defendant is disoriented as to date and time but uses newspapers and television announcements as cues to compensate for his deficit, functional evaluation would credit the adaptation as an effective use of resources. In contrast, a formal mental status evaluation would note the disorientation negatively." (Nolan, p. 211).

It seems likely that some type of detailed, behaviorally-oriented, possibly interdisciplinary assessment would facilitate a just and informed decision. At least one legal commentator has noted that a detailed analysis of the facts in guardianship hearings seldom appears in reported opinions, and "that perhaps a thorough, concrete assessment might encourage judges to further document their decisions." (Comment, "An Assessment of the Pennsylvania Estate Guardian Incompetency Standard," University of Pennsylvania Law Rev. 124(4) 1048, p. 1060, cited by Nolan, p. 212)

The second function of investigative personnel might be to make a recommendation to the court concerning the least restrictive program of services, care, or treatment consistent with the person's needs. (Regan and Springer, p. 50). (See Issue III.A. below concerning the "least restrictive

alternative.) The ABA model statute specifies that the report of the "multidisciplinary evaluation team" must include:

> "an opinion regarding the type(s) and extent of assistance, if any, required by the respondent to manage his or her financial resources, to protect his or her rights, and/or to meet the essential requirements for his or her physical health or safety, and why no less restrictive alternatives would be appropriate" (Sales, Powell, Van Duizend and Associates, p. 551).

Finally, investigative personnel might advise the court of their prognosis for the future -- whether the condition and limitations of the alleged incompetent may change, and what type of services or treatment will facilitate improvement. (See ABA model statute, Sales, Powell, Van Duizend and Associates, p. 551.) This would be useful to the court in delineating a limited or temporary protective arrangement.

However, a complete evaluation by investigative personnel could well involve substantial violations of the privacy of the alleged incompetent. It could include inquiry into his/her most intimate concerns, and has a potential for stigmatizing the subject among his/her friends, neighbors and colleagues. Moreover, the proposed ward's "interest in being left alone is violated by the very effort to make the evaluation, especially if it is persistent and thorough." (Nolan, p. 214) Therefore, the ABA model statute provides

> that "the evaluation shall be conducted so as to minimize interference with the respondent's activities and intrusion into the respondent's privacy." (Sales, Powell, Van Duizend and Associates, p. 550)

Issue II.B.(3)

What types of training, if any, should be provided for investigative personnel assisting the court?

Background

The Pre-conference Survey indicated that generally, investigative personnel are not specially trained beyond their schooling and professional experience. A few respondents noted some type of orientation -- "an orientation session," "monthly meetings," "seminars for social service workers," "an overview of guardianship procedures."

Although in many cases, the investigative personnel will have extensive social work, law, psychiatric or nursing backgrounds, they could probably benefit from more knowledge about guardianship law and procedures, the aging process, the myths and stereotypes of aging; and how to communicate with older persons who may be frail, confused and/or experiencing sensory loss. Moreover, they should be thoroughly familiar with existing community resources, and should have an understanding of the role of the state/area agency on aging under the Older Americans Act.

Two excellent, recent examples of such training exist. First, in Oregon, a Court Visitors Project was designed in 1981 to implement a new law making fact-finding interviews with petitioners and proposed wards mandatory. Volunteer visitors act as advisors to the court in conducting the interviews. The Project has prepared a Handbook for Court Appointed Visitors

> "Designed to acquaint program volunteers and administrators with the background of the project and the role they will play in its implementation. Contained in the handbook are details as to the organization of a visitors program, a detailed description of what guardianship entails, sample interviewing forms, a detailed discussion of guardianship for the elderly and mentally ill, and a medical discussion of the frail elderly and disease processes." (Soennichsen, "The Court Visitor Project," 46 Oregon State Bar Bulletin 5, Feb.-March 1986, p. 8 at 9)

In Colorado, the Probate Court of Denver and the legal services developer for the elderly of the Medical Care and Research Foundation are jointly sponsoring a volunteer visitors project, which began in May, 1986. Visitors were trained in two sessions by: (a) a psychologist who discussed how to recognize when a mental health status evaluation is necessary;

(b) a geriatrician who talked about typical diseases in older people which affect decision-making capacity, how to ask doctors questions concerning those conditions, and how to recognize and distinguish depression; (c) two speakers who discussed how to communicate with frail elderly, how to develop trust, interviewing techniques; (d) a social worker and former guardian who talked about how to interview guardians; and (e) a legal aid attorney who discussed contested cases. The volunteers will also benefit by bimonthly meetings to exchange experiences and formulate solutions to problems. (Interview with Ina Katich, Colorado Legal Services Developer, May 1986)

Issue II.C.

Advanced age of the Alleged Incompetent

Issue II.C.(1)

How should the court respond to evidence that relies chiefly on the advanced age of the alleged incompetent?

Background

A total of 35 states list "advanced age," "old age," or "senility" as a statutory ground for declaring incompetency or incapacity. Twenty-two of these list age in both guardianship and conservatorship statutes, and an additional 13 list age only in their conservatorship statutes. (Fosberg, (1986), pp. 3-4; see also Parry, Table 7.3) Legal scholars and advocates for the elderly, however, have objected to using the condition of old age as a ground for ruling that a person needs a guardian:

> "Fundamentally, old age refers to a number of birthdays, not to a mental or physical condition implying a loss of capacity. . . . Because old age is listed in the statutes in the context of mental illness or deficiency, alcoholism, and addiction, the courts tend to regard old age as a scientifically distinct disease. Testimony by a physician may unintentionally reinforce this false inference. When courts rely on such testimony in framing a decision, old age in the eyes of the law then does become a synonym for incompetency, although the majority of elderly persons are competent as long as they live." (Regan & Springer, p. 36)

In 1982, the National Conference of Commissioners on Uniform State Laws promulgated amendments to Article V of the Uniform Probate Code. These amendments included "advanced age" within the definition of "incapacitated person." When these changes were before the ABA House of Delegates in 1983, the ABA Commission on Legal Problems of the Elderly and the Young Lawyers Division opposed their approval, stating:

> "The use of the term 'advanced age' suggests that the passage of years alone may result in a loss of decision-making capacity. There is no scientific basis

> for this conclusion. Use of the term is a blatant instance of age discrimination. It would encourage the courts -- and society as a whole -- to falsely stereotype the elderly as unable to manage their own affairs. The term should be deleted." (Recommendation to the ABA House of Delegates by the Young Lawyers Division, through its Committee on the Delivery of Legal Services to the Elderly, Aug. 1983. The Commission on Legal Problems of the Elderly concurred.)

The Amendments were nonetheless approved, including Sec. 5-101(1) listing "advanced age" as a ground for incapacity. Of the fourteen states which in varying degrees have adopted Article V of the UPC, six* have specifically omitted "advanced age." (Fosberg, p. 21) This is perhaps a signal of recognition that old age is not equated with mental deficiency.

How have courts treated the statutory ground of "advanced age" in determining incompetency? In the Pre-conference Survey of the 13 jurisdictions including the statutory term, six reported the ground of "advanced age" is "usually" raised, four that it is "sometimes" raised and three that it is "seldom" raised. All respondents except one indicated advanced age is not considered a sufficient ground for a determination of incompetency. One commentator notes that "some courts" use the condition of old age as a sufficient ground for ruling that a person needs a guardian. (Regan and Springer, p. 36) It appears, however, that little legal research has been done directly on this issue.

Two recent Nebraska conservatorship cases, though, are directly on point.** In In Re Estate of Oltmer, 336 N.W. 2d 560 (Neb 1983), an 80-year old widow had become the owner of extensive farmland upon the death of her husband. She had transferred much of it to her son and grandson and then had contracted to trade some of the land for another farm, losing, according to a real estate appraiser, $152,000. Upon petition of the woman's daughter, the court granted and the Nebraska Supreme Court upheld appointment of a conservator. The Nebraska Supreme Court based its finding directly upon her age.

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*Alaska, Maine, Michigan, Minnesota, Nebraska, North Dakota. However, only Minnesota has also eliminated age in its conservatorship statute.

**These cases were summarized in Brunette, "Evidentiary and Policy Issues in Conservatorship Proceedings Involving Persons of Advanced Age," ElderLaw Review, Nebraska Bar Association Young Lawyers Section, Committee on the delivery of Legal Services to the Elderly and Nebraska Department on Aging, December 1985.

citing the Nebraska conservatorship statute provision:

> "A conservatorship may be appointed for a person who because of advanced age is unable to manage his property effectively and whose property will be wasted or dissipated unless proper management is provided." Neb. Rev. Stat. §30-2630(2).

The dissenting opinion in Oltmer stated that:

> "We have a woman, 80 years of age, who has made some poor business transactions. . . . That is not, in my view, what is meant by the provisions of Neb. Rev. stat. §30-2630(2). While it is true that the record does disclose that an individual of advanced age has improvidently dealt with her property, that is not the same as showing that she is unable to manage her property and affairs because of advanced age. The fact that one has made bad investments or is inclined to give one's property away is not sufficient to justify the appointment of a conservator over the objections of the one for whom the conservator is being sought. Were it otherwise, a number of us would have conservators appointed for us. Often all that persons of advanced age have left is their dignity and the ability to dispose of their property as they may choose. We should not take that right away so quickly." Id. at 336 N.W. 2d 562

In a 1985 Nebraska Supreme Court case, In Re Estate of Wagner, 367 N.W. 2d 736 (Neb. 1985), the subject was an elderly widow who had revoked leases of farm property from her son and son-in-law and leased the same property to a third party at much greater income. Four of her children sought the appointment of a conservator. The court found no evidence of mismanagement, and so did not reach the age issue, but stated in dicta that "advanced age alone . . . is not a basis for appointing a conservator." Id. at 367 N.W. 738-739. The Wagner dicta cited dicta in an earlier case, Cass v. Pense, 54 N.W. 2d 68 (1952), in which the court observed:

> "It is inevitable that if life is prolonged to old age the advance of years will be marked by a greater or less decrease of bodily powers and mental efficiency. But generally if that course be normal, if it be such as attends age unaffected by abnormal brain conditions,

> there will not be mental incompetency within the meaning of the law and nothing to justify a court in depriving a person involuntarily of the control of his property." Cass, supra, at 54 N.W. 2d 72-73 as cited in Wagner, supra, at 367 N.W. 2d 739-740

Moreover, the majority of state statutes, as well as the Uniform Probate Code, in defining need for a guardian or conservator, use terms such as "lacks capacity to make responsible decision," "unable to adequately conduct his affairs," "unable to manage property effectively," or "incapable of taking proper care of his property" (Emphasis added; see Fosberg, Chart B). Such terms could encourage courts to impose their own values on the proposed ward -- and this may more readily occur if the proposed ward is elderly. Older persons, it has been argued, should not be held to a higher standard than the rest of the population; and should be allowed, like any other citizen, to make mistakes or to make decisions which may not be socially acceptable or wise:

> "Those who are old or mentally ill should not be required to make decisions which are responsible in the eyes of a judge when the rest of the population is free to make its own decisions. The emphasis should instead be on the person's lack of capacity to engage in a rational decision-making process, rather than on the societal acceptability of the outcomes of that process."
> (Recommendation of the ABA Young Lawyers Division to the ABA House of Delegates regarding Amendment to Article V of the Uniform Probate Code, 1983; also see generally Alexander, Law and the Aged, 17 Ariz. L. Rev. 268 (1975); and Krauskopf, Advocacy for the Aging, pp. 114-117)

Issue II.C.(2)

To what extent should judges who handle guardianship cases be educated about the aging process, and about the societal myths and stereotypes of aging?

Background

> "Few of us like to consider [old age] because it reminds us of our own mortality. It demands our energy and resources, it frightens us with illness and deformity, it is an affront to a culture with a passion for youth and productive capacity. . . . And because we primarily associate old age with dying, we have not yet emotionally absorbed the fact that medical and public health advances now make it possible for millions of older people to be reasonable healthy." (Butler, p. xi)

So begins Dr. Robert N. Butler's 1975 Pulitzer prize winning book, Why Survive? Being Old in America. Dr. Butler goes on to describe some deeply rooted societal myths and stereotypes about older people: (1) that chronological aging determines physical, mental and emotional status; (2) that the old are unproductive; (3) that they prefer to disengage from life; (4) that they are inflexible; (5) that they are senile, forgetful, and have reduced attention spans; and (6) that old age is a time of serenity. (pp. 6-11). These classic myths are perhaps joined by a new one currently being touted in the media -- that all older people are doing fine economically, and that this is at the expense of the rest of society (See "The Coming Conflict As We Soak the Young to Enrich the Old," The Washington Post, Jan. 5, 1986). What these myths have in common is that they often ignore the differences among the elderly, and that they fail to take into account what we have learned about the aging process:

> "The aging process is different for each individual. It has chronological, biological, economic and psychosocial facets. Much has been learned which dispels long-held assumptions about the aging process. We have learned, for instance, that some conditions once presumed to constitute irreversible senility are in fact treatable and reversible. What appears to be senile behavior in some may be the behavioral manifestations of medication, malnutrition, unrecognized physical illness, or emotional anxiety and depression." (ABA, Effective Counseling . . ., p. 3, derived from Butler)

Dr. Butler coined the term "ageism" to connote the persistent prejudice against the elderly which pervades our society:

> "Ageism can be seen as a process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender. Old people are categorized as senile, rigid in thought and manner, old-fashioned in morality and skills. . . Ageism allows the younger generations to see older people as different from themselves; thus they subtly cease to identify with their elders as human beings." (Butler, p. 12, quoted from Butler and Lewis, Aging and Mental Health: Positive Psychosocial Approaches, (1973); also see "Ageism in America", Aging, Aug.-Sept. (1984), Administration on Aging, U.S. Department of Health and Human Services)

Judges are as much affected by this ageism as the rest of society. The danger is that it may govern their thinking about elderly alleged incompetents, and ultimately their decisions about the need for guardianship. For instance, in overturning a Chancery Court's decision denying a conservatorship petition by two nephews against their elderly uncle, the Mississippi Supreme Court recently declared, "Advanced age will naturally bring about a decrease in physical prowess and mental efficiency." Harvey v. Meador, 459 So. 2d 288, at 292 (1985). The Court cited no medical authority for such a statement, but merely made an assumption. The following paragraph, while written for attorneys, is as applicable for judges. They must, it says --

> ". . .first and foremost recognize that older [persons before the court] are adults who are experiencing increasing limits on their autonomy as they age. Physical and financial independence may be increasingly threatened. The social and family world may be shrinking at a frightening rate. Because of this, particular attention must be given to avoiding overly intrusive responses. . . [such as concluding that an older person] needs a conservator or guardian where a limited power of attorney might be sufficient. . . . Stereotyping may result in a generalized skepticism of older clients' abilities to make their own decisions or to explain their own

> problems. While the . . . aim should be the least restrictive solution for the individual . . . the perception that the elderly . . . are inherently less than competent, and thus not to be trusted, seriously obscures that goal." (ABA, Effective Counseling . . ., p. 2)

To facilitate fair, informed and humane decisions, then, judges should be educated regarding: (1) the aging process, and its physical, psychological, social and financial aspects; (2) the societal myths and stereotypes of aging; and (3) the need to examine their own attitudes about aging. Indeed, as early as 1968, a judge then attending a "National Institute on Protective Services" -- at that time an innovative and ground-breaking meeting -- commented that judges "may appear to be rigid, whereas actually they are unacquainted with the subject of impairment in older persons . . . [and urged] that a valid, sound training program be inaugurated" (Hall and Mathiasen, p. 28). Such training should assist courts in distinguishing the normal aging process from a medical impairment. Moreover, it should encourage them to inquire into the possible effects of malnourishment, medication or depression on an elderly alleged incompetent; and to question whether specific conditions or behaviors may be temporary or reversible. The following example -- written for attorneys and involving civil commitment -- is nonetheless relevant for judges, and dramatically demonstrates the importance of soliciting testimony on the effects of medication on the elderly :

> Mrs. A is an elderly woman recently admitted to the geriatric ward of a psychiatric hospital. She was brought there by the police responding to complaints by neighbors that she was noisy and hostile. When the attorney interviews her, she is alert, physically active and seems fully capable of understanding information on her legal status. She expresses anxiety that the hospital staff will try to commit her. She feeds herself, eating heartily, and walks down the hall to the bathroom.
>
> Later, the attorney receives notice that the hospital has petitioned for her commitment, alleging that she is "gravely disabled." The medical record shows that at the time of admission, Mrs. A was angry and suspicious; and the ward physician prescribed Haldol, an anti-psychotic medication. The attorney and case worker visit Mrs. A. She is lying in bed, is barely able to recognize the attorney, and replies to his questions in a vague and disjointed

manner. The nurse reports that she seldom leaves her bed, has been incontinent, has had to be fed by hand, and eats little.

The key to this situation is the medication the client is taking. Mrs. A's attorney wisely consulted a psychiatrist about the effects of Haldol. The doctor stated that the drug could very well have produced the passivity, loss of appetite and disorientation. Thus, the attorney requested a continuance of the commitment hearing, and asked that Mrs. A be taken off Haldol, at least until the hearing date. Within a week, Mrs. A was again alert, recognized her attorney and communicated well. Her appetite returned, and she was no longer incontinent. The commitment petition was dismissed, and Mrs. A was accepted by a sheltered housing project for the elderly. (Derived directly from Costello, "Representing the Medicated Client," Mental Disability Law Reporter, Jan.-Feb. 1983)

Issue III.A.

Maximizing Autonomy of the Ward

Issue III.A.(1)

Should the court find that no less restrictive alternative exists before the appointment of a guardian?

Background

The inherent and recurring conflict in guardianship law is between the civil liberties of the ward or proposed ward, and the state's parens patriae power. Legal scholars have argued that the constitutional doctrine of the "least restrictive alternative" should apply in guardianship cases, limiting state paternalism to only what is necessary for the health and welfare of the individual.

The "least restrictive alternative" doctrine was established by the United States Supreme Court in Shelton v. Tucker, 364 U.S. 479 (1960), where the court declared unconstitutional an Arkansas statute that required teachers in state-supported schools to file affidavits listing all organizations to which they belonged or contributed. The court stated:

> "Even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose." 364 U.S., at 488.

This doctrine was first applied in the area of civil commitment in Lake v. Cameron, 364 F. 2d 657 (D.C. Cir. 1966), in which the court found that Mrs. Lake, an elderly woman, could not be subject to an indeterminate commitment without a complete expiration of all possible alternatives for her care and treatment in the community. The court stated:

> "Deprivations of liberty solely because of dangers to the ill persons themselves should not go beyond what is necessary for their protection." 364 F. 2d, at 658.

The holding of Lake that the least restrictive alternative doctrine is applicable in commitment cases has been followed by numerous courts. (Twelve such cases are listed in Dudovitz, p. 80.) For instance, in Gary W. v. State of Louisiana, 437 F. Supp. 1209 (E.D. La. 1976), the court held the doctrine requires

> "that the state give thoughtful consideration to the needs of the individual, treating him constructively and in accordance with his own situation, rather than automatically placing [him] in institutions." 438 F. Supp., at 1217

Since similar deprivations of rights and liberties are involved in guardianship proceedings, the doctrine of least restrictive alternatives should be applicable here as well. (Dudovitz, p. 80; Frolik, p. 655; Regan and Springer, p. 48)

The Uniform Probate Code well reflects this idea, providing that in guardianship proceedings the court should

> "encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's mental and adaptive limitations or other conditions warranting the procedure." (Sec. 5-306)

The model guardianship statute drafted for the U.S. Senate Special Committee on Aging provides that the court may appoint a guardian only

> "after finding in the record based on clear and convincing evidence . . . that no less restrictive form of intervention is available which is consistent with the incapacitated person's welfare and safety." (Regan and Springer, p. 83)

Similarly, the model statute drafted by the ABA Commission on the Mentally Disabled provides that the court "shall impose the least restrictive dispositional alternative which . . . will be sufficient" to meet the needs of the proposed ward. (Sales, Powell, Van Duizend and Associates, p. 555)

Moreover, allowing the alleged incompetent to retain as much autonomy as possible seems consistent with gerontological findings that maintaining opportunity for choice and control are important to the mental health of the elderly. Scientific studies show that loss of ability -- or perceived ability -- to control events can lead to physical and/or emotional illness. (Mishkin, p. 4 of draft, citing scientific studies in fn 6) Indeed, complete loss of status as an adult member of society could in fact act as a self-fulfilling prophecy, intensifying any disability an older person may have. As the aged are already often experiencing a number of familial, social, physical and economic losses, limitations on their legal status should be minimized if possible.

Specific legal interventions which may serve as alternatives to plenary guardianship include: limited or partial guardianship (see Issue III.A.(2) below); power of attorney, where the alleged incompetent has the capacity to execute such a document; appointment of a representative payee; or creation of a trust. However, legal intervention may be unnecessary if sufficient social services exist within the community to enable the alleged incompetent to remain independent, and if he/she voluntarily accepts these services.

Critical social services might include homemaker/home health aide services, transportation, shopping, friendly visiting, congregate and home delivered meals, senior centers, case management, day care facilities, sheltered housing, board and care homes, and programs for financial management. A recent study of cases referred to the Los Angeles County Office of Public Guardian found that money management was one of the three most frequent reasons for referral, and recommended the establishment locally of effective, accountable financial management programs for the vulnerable elderly. (Steinberg, p. 32, 36) Some communities have an extensive network of supportive services for frail, older persons, while other communities have only the rudiments, and in some rural areas, there may be next to nothing at all. In the Pre-conference Survey, 35% of respondents indicated community resources are "generally sufficient" to meet the needs of elderly wards, 43% concluded resources meet the needs of "some" elderly wards, and 22% found the resources generally insufficient.

The Older Americans Act (42 U.S.C. §3001 et seq.), first passed in 1965, declares that older people are entitled to "efficient community services . . . which provide a choice in supported living arrangements and social assistance in a coordinated manner" Sec. 101(8). Under Title III of the Act, each state has a state agency on aging. The state is then subdivided into a number of smaller planning areas, each coordinated by an area agency on aging. The area agencies (of which there are now over 700 nationwide) -- which may be either public or private nonprofit agencies -- are charged with "the development of comprehensive and coordinated service systems" (Sec. 301(a)). Generally, they do not deliver services directly, but contract with local providers for a range of social services. Older Americans Act funds flow from the Administration on Aging in the U.S. Department of Health and Human Services, to state agencies, and in turn to the area agencies. The money is then allocated according to state and area plans which are developed annually and refined based upon the results of public hearings. Each state and area agency must have an advisory council, which includes elderly persons as members. In addition to allocating its Older Americans Act monies (as well as any state or local funds it may have), the area agency on aging is to "serve as the advocate and focal point for the elderly within the community" (Sec. 306(a)(6)(D)). Consultation with the area agency on aging could assist the court in identifying relevant community

resources for elderly wards and potential wards. In the Pre-conference Survey, 33% of respondents reported the court had been in contact with the state and/or area agency on aging, while 67% had not had such contact. Such contacts can be useful, as well, in determining what the service gaps are in provision of the "least restrictive alternative" for elderly alleged incompetents; and in proposing constructive -- and cost-effective -- solutions, perhaps through joint public/private efforts.

Issue III.A.(2)

Should the court limit the guardian's powers in accordance with the particular needs of the ward?

Background

> "Although complete control may be necessary over a ward who is utterly incompetent, it is not suited to the needs of a ward whose loss of competence is only partial. Many elderly people may need help only with certain recurring events, such as cashing checks or paying bills, or with certain transactions, such as selling a house, buying an annuity, or selecting a nursing home. They need a flexible guardianship tailored to their individual capacity, one which allows them to retain control over activities they can perform unaided." (Regan and Springer, p. 40)

The need described above is for specifically limiting a guardianship, in accordance with the least restrictive alternative principle, to those aspects of a ward's life which clearly require attention. A "limited guardianship" has been defined as a relationship in which the guardian "is assigned only those duties and powers which the individual is incapable of exercising" (Sales, Powell, Van Duizend and Associates, p. 538). The concept has been included in the Uniform Probate Code:

> "The Court, at the time of appointment or later, on its own motion or on the appropriate petition or motion of the incapacitated person or other interested person, may limit the powers of a guardian otherwise conferred by this [Act] and thereby create a limited guardianship." Sec. 5-306(c). (Also Sec. 5-408 provides for a limited conservatorship.)

It is also included in the model statute drafted for the U.S. Senate Special Committee on Aging (Regan and Springer, p. 90), and the model statute drafted by the ABA Commission on the Mentally Disabled (Sales, Powell, Van Duizend and Associates, pp. 538 and 555). A provision for limited guardianship has been enacted in at least 20 states. (Parry, p. 384)

While many states do not make statutory provision for limited guardianship, probate courts may well have the power to create limited guardianships because of their equitable nature. Historically, guardianship actions were under the

jurisdiction of equity courts; and traditionally, courts of equity have tailored their remedies to fit the facts before them. Thus, where a proposed ward is only partially disabled, courts could choose to exercise less than the full authority they possess, and grant only those powers necessary to protect the ward's health and safety and/or manage the ward's financial affairs. (Dudovitz, p. 81) Courts have recognized the inherent equitable authority of probate courts to limit the powers of a guardian. See, e.g., Guardianship of Basset, 385 N.E. 2d 1024 (1979); In Re Quinlan, 355 A. 2d 647 (1976); and Strunk v. Strunk, 445 S.W. 2d 145 (1969).

To what extent have courts used their statutory and/or equitable power to limit guardianships? In the Pre-conference Survey, 61% of respondents reported appointing limited guardians for elderly wards, although usage was generally low -- and with two exceptions ("170 cases" and "perhaps 50%"), ranged from "under 20 cases" to one case.

A 1979 study by the ABA Commission on the Mentally Disabled on the implementation of limited guardianship, public guardianship and adult protective services statutes in six states found the limited approach was rarely used (Axilbund, pp. 10-12, p. 18). Specifically, in 1978, the study estimated limited guardianships constituted about ten percent of the guardianship cases filed in the Seattle area, and probably a smaller fraction statewide (Axilbund, p. 10). In Milwaukee, none of the 416 guardianship petitions filed sought or resulted in limited guardianships, although use outside of Milwaukee was thought to be perhaps as high as 25% (Axilbund, p. 12). The 1985 study of 369 petitions in Maine found that only one sought limited guardianship, none sought limited conservatorship, and five sought single transaction arrangements. In addition, the number of joined petitions (guardianship plus conservatorship) exceeded the combined number of guardianships and conservatorships, causing the study to conclude that "generally, the most, rather than the least restrictive protective arrangement is employed" (Legal Services for the Elderly, Inc., pp. 4-5, p. 18).

What reasons have been given for the perceived low usage of limited guardianship? In the Pre-conference Survey, 22% of respondents recognized obstacles to its use, citing a need for legislation, lack of awareness by attorneys, "full [guardianship] is simpler, and lawyers and judges don't like to change," "it depends on the inclination of judges to use it," and "no one knows where they stand when dealing with such a ward." The ABA study referenced above suggested that lawyers and judges may be unaware of the importance of the statutory provisions allowing for limited guardianship, and suggested "an educational campaign, focused on the bench and bar." It also suggested that as judges are provided with more detailed, functional information about the proposed ward, they will better be able to tailor guardianships (Axilbund, p. 18). Frolik offers the following explanation:

> "In part, plenary guardianship is favored because it is familiar. Practitioners and courts feel comfortable with what they know. Lacking an appreciation of the advantages to the ward of limited guardianship, they tend to automatically request the appointment of a plenary guardian. . . . But the problem goes deeper. . . . A judge, when faced with the choice of granting a limited or plenary guardian, is likely to select plenary power in the belief that such power will provide the guardian with sufficient authority to handle any circumstances that might arise. The appointment of a limited guardian, on the other hand, might result in a rehearing if the power granted to the guardian should prove inadequate to the changing needs of the ward. Moreover, the appointment of a plenary guardian eliminates the effort of tailoring the power of the guardian to fit the particular needs of the ward. In short, plenary guardianship is familiar, uncomplicated, and saves time and effort." (Frolik, p. 654)

Rather than routinely granting full powers to the guardian, courts should consider, pursuant to the least restrictive alternative doctrine, making specific findings as to the ward's disabilities, and granting only those powers necessary. In particular, it has been suggested, if institutionalization is not necessary, the guardian should not be given the power to institutionalize the ward; and "other powers, such as the power to control medical treatment and to manage the financial affairs should also be drawn as narrowly as possible." (Dudovitz, p. 82)

Issue III.A.(3)

Should the court avoid the permanent nature of guardianships by providing for periodic judicial review, and/or granting time-limited guardianships where appropriate?

Background

Most states provide for restoration of incompetent persons through a proceeding to terminate the guardianship. Usually the burden is on the ward (or "any interested person") to initiate the proceeding (Parry, p. 393 and Table 7.6). Commentators have observed that such a proceeding is rare, difficult and unlikely to succeed (Parry, p. 392; Mitchell, p. 455), particularly for the elderly:

> "Assuming that, contrary to stereotype, many elders are perfectly capable of reversing a 'downhill' trend, there is usually no one with a real interest in initiating termination proceedings. The elder, however capable, is often unaware of his/her rights or unable to obtain assistance, especially if he/she is institutionalized or isolated. If a petition to terminate is filed, the burden is on the ward to establish that he/she is no longer incompetent. This is an awesome effort in light of the . . . presumption given the initial determination that he/she is incompetent." (Dudovitz, p. 82)

Since restoration is but a remote possibility for most elderly wards, it would seem consistent with the principle of the least restrictive alternative to require guardians periodically to justify to the court the continuing need for the deprivation of the ward's rights. Some state statutes provide for periodic judicial review (as well as both the ABA model statutes at pp. 558-559 and the model statute done for the U.S. Senate Special Committee on Aging at p. 85). In other states, given the equitable nature of guardianship, the court could perhaps at its own discretion review the need for continuing protection at regular intervals.

An alternative approach would be to grant short-term or time-limited guardianships in appropriate cases -- where there appears to be a genuine possibility of the ward's improvement, or where the ward needs help only with the immediate, presenting problem or crisis. A 1985 study of the Office of Public Guardian of Los Angeles County found a significant need for this type of short-term intervention

> "to deal with a crisis and stabilize the client's situation. . . .making

> transitional decisions regarding assets, new living arrangements, treatment and/or long term care. . . . Thus, the Public Guardian is in a position to provide a meaningful and needed service if it were able to intervene with a fixed period, perhaps of 6 to 10 weeks. Currently there is a paradoxical prejudice in probate codes and/or court/public guardian procedures against 'temporary' [guardianships] and in favor of permanent ones." (Steinberg, pp. 37-39)

The study further pointed out that short-term guardianship might encourage distant relatives or friends to help without onerous long-term obligations.

Some 33 jurisdictions provide for temporary or emergency guardianships that cover periods of time ranging between 30 days and 6 months (Parry, p. 385 and Table 7.5). The Pre-conference Survey indicated that most respondents make such emergency appointments, usually in response to immediate medical needs. The danger in such short-term arrangements, commentators have noted, is that they often provide the proposed ward with less procedural due process protection than is required in a regular guardianship hearing, and that this may make for "pro forma proceedings, representation by unprepared attorneys, or undue influence from the community." (Parry, p. 385)

Issue IV.A.

Submission and Review of Guardian Reports

Issue IV. A.(1)

What information should be included in guardian reports?

Background

Most states provide for some type of continued court supervision after the appointment of a guardian. Often this means an annual inventory and accounting of the ward's estate. (Parry, p. 385 and Table 7.4; Connecticut, pp. 7-8) The Uniform Probate Code requires conservators of property to account to the court only upon their resignation or removal (Sec. 5-418), and does not include any kind of a review for a guardian of the person.

Given the loss of liberties involved, the vulnerability of elderly wards, and the need to ensure the least restrictive alternative, it seems essential that the court receive and review information about the status and well-being of the ward, and actions the guardian has taken. The Pre-conference Survey indicated that almost all respondents require periodic reporting; but that 68% require the reports to include quality of life information about the ward, while 32% do not.

The model statute drafted by the ABA Commission on Mental Disability sets out specific information to be included in guardian reports, extending the requirement for a periodic financial accounting to personal guardianship. The report is closely linked to the idea of judicial review of continuing need for the guardianship (see Issue III.A.(3) above). It contains information on: significant changes in the capacity of the disabled person, the services being provided, actions taken by the guardian, problems relating to the guardianship, reasons why the guardianship should not be terminated or why no less restrictive alternative would suffice. (Sales, Powell, Van Duizend and Associates, pp. 566-567) For a conservator, the report would also include a complete financial statement of resources under his/her control. (p. 572)

In addition, the model statute mandates a guardian to develop and submit to the court an "individual guardianship plan." The plan is to be developed with the participation of the ward "to the maximum extent possible." It is to specify necessary services, means for obtaining these services, and the manner in which the guardian will exercise and share his/her decision-making authority. Similarly, an "individual conservatorship plan" is to specify the services necessary to manage the financial resources involved, means of providing those services, manner in which the conservator will exercise and share decision-making authority, and policies and

procedures governing the expenditure of funds. An updated plan is to be submitted with each annual report. Such a plan is a useful assessment tool, in that it "provides a reference against which the performance of the [guardian or conservator] and the delivery of assistance and services can be compared." (Sales, Powell, Van Duizend and Associates, pp. 562-563 and 568)

Issue IV.A.(2)

Should the court establish a procedure for complete and systematic review of guardian reports?

Background

Detailed information in guardian reports will be of no value if it is not thoroughly reviewed by the court, with two objectives: (1) to assure the least restrictive arrangement is being used to protect the health, welfare and safety of the ward; and (2) to assure guardians and conservators are not abusing the ward and/or ward's assets they are charged with protecting.

Guardianship/conservatorship abuse has recently been spotlighted by the national press (See "Ripping Off Estates -- An Epidemic of Abuse," U.S. News and World Report, Feb. 25, 1985, pp. 53-54; and "Courts See More Estates Misused By Those Assigned to Guard Them," Wall Street Journal, July 15, 1985) These articles claim the problem "has become far more common than people realize," and that there is "a rise in the misuse of estate money by conservators [partly because] there are more and more elderly people" who need these services. The U.S. News and World Report article notes that many probate judges who handle guardianships "have little time to devote to them in addition to their main duty of deciding disputes over wills," and states that

> "Some urge more intense efforts by courts to study the annual reports that guardians and conservators must file in most states." (p. 54)

Additionally, deficiencies in the filing and reviewing of annual reports were noted by a grand jury investigation in Miami, Florida. The Dade County Grand Jury for the 1982 spring term supervised a review of 200 random guardianship cases opened between 1979 and 1981. It found that the great majority of guardianship files were incomplete in annual reports. "Of the 200 random cases, 87% were not up to date in annual reports concerning the ward's personal status, 75% of the cases were not timely in financial reports and 91% of the cases were incomplete in physical examination reports." (Schmidt, "The Evolution of a Public Guardianship Program," p. 356) The Grand [illegible], attributed this "substantial shortfall in annual reports" as follows:

> Most guardians either do not know about their report responsibilities, or they are not fulfilling their report responsibilities. Most attorneys for guardians either do not know about the report responsibilities of their guardian clients, or they are not effectively

> communicating those responsibilities to their clients. The clerk's office has either been unable to inform or remind guardians of their report responsibilities, or has not effectively recognized the significance of such reports sufficiently to remedy the problem. (Final Report of the Grand Jury, Dade County, Fla. (Nov. 9, 1982, p. 32, as quoted in Schmidt, "The Evolution. . .," p. 357))

In response to the Grand Jury, the probate division in Dade County advanced its timetable for computerization of filings.

The recommendation of the 1985 report produced for the Connecticut Probate Administration is as follows:

> "If the judges do not have time to make a complete review of all accountings, the system should be designed so that someone does. A number of states have at least one person or [office] whose sole responsibility is the auditing of accounts. The form of review need not differ from that which would be given by a judge, but its completeness would be assured. After the complete review is given, the trouble cases could be sent to the judges. In essence, the reviewer would be responsible for preliminary determinations. The District of Columbia has been very successful with this procedure as have a number of other states. If the system is to work, more than a cursory glance must be given to the accounts." (p. 12)

Thus, it would seem that designation of a person/office to review reports, systematic communication by the reviewer to the judge, and computerization or some type of workable tickler system are all elements in the efficient monitoring of guardian reports.

Issue IV.B.

Training of Guardians

Issue IV.B.(1)

Should the court encourage orientation, training and ongoing technical assistance for guardians?

Background

The duties of a guardian for an elderly ward are broad and demanding. The commitment could entail dealing with: housing and long term care issues, financial issues, medical care issues, legal issues, personal visits and shopping, and the filing of court reports. The guardian must be prepared and knowledgeable about "visitation of a ward, protection and preservation of the estate, psychological and medical treatment, advocacy on behalf of the ward, encouraging adequate living arrangements, quality of life and socialization and seeking of restoration of the ward's rights." (Michigan Task Force, pp. 12 and 53)

At least two recent studies have called for training programs, training materials and consultation resources for guardians. First, the 1986 Report of the Michigan Adult Protective Services Task Force notes that

> "no statewide uniform standards exist for the training of guardians and no single body is responsible for providing training; [although] certain individual courts, local mental health and social services offices, and protection and advocacy agencies carry out [limited training]." (p. 50)

The report recommends that a "State Public Guardianship Board" should "develop and carry out training programs for guardians" and "prepare and distribute model pamphlets and instructional materials to guardians." (p. 53)

Second, the 1985 report on Alternative Approaches to Conservatorship and Protection of Older Adults Referred to Public Guardian in Los Angeles County notes the frequent calls to the Office of Public Guardian by private conservators seeking information and advice:

> Frequently, well-meaning people lack the knowledge to understand the disability and lack the skills to serve as case manager for what is often round-the-clock care. . . . Often they misunderstand their obligations or are unaware of community resources."

The Report finds that the Superior Court should "ensure that private conservators are made aware of where they can turn for help and advice." It recommends "a training and case consultation resource for private probate conservators" which could be

> "an information and referral service located at the court to inform new private conservators of existing case management, support groups and caregiver respite programs to which they could turn for help." (p. 54)

It also recommends "a guidebook for petitioners and private conservators."

Although no national study has been done, it appears that guardian training throughout the country is rare. The Pre-conference Survey indicated that 80% of respondents do not provide or assure guardianship training. While 20% do provide training, it seems very limited, consisting mostly of an instruction sheet on guardianship duties and/or instructions from the clerk. However, scattered efforts at training are underway. Examples include:

- At the urging of a circuit judge, a training program was begun for guardians in Pinellas County, Florida, a number of years ago. A Guardian Association was established to provide for educational programs, the exchange of ideas and problems and to assist in the development of needed services. The Association produced a detailed handbook for guardians, and publishes a regular bulletin. (Schmidt, Miller, Bell and New, p. 155)

- The judges in the Probate Division of the Circuit Court of Dade County, Florida, with the assistance of the Dade County Young Lawyers Section, produced a 15-minute training videotape for guardians explaining their duties. Each guardian is required to see the videotape right after his/her appointment. The letters of appointment are not issued until he/she has viewed the film.

- In 1984, the Washington Bureau of Aging and Adult Services prepared a Washington Adult Guardianship Handbook for "individuals and organizations serving as guardians, limited guardians or guardian ad litems for older persons." The Bureau also produced a film to accompany the Handbook. Both consist of modules covering: guardianship fundamentals, overview of guardianship proceedings, the guardian ad litem,

conduct of guardians of the person, conduct of guardians of the estate, and special procedures.

- In 1981, the Legal Counsel for the Elderly Program of the American Association of Retired Persons produced the LCE Conservatorship Manual, designed for use by volunteer attorneys who would either serve as conservator or assist the client with other less restrictive arrangements. The 142-page booklet contains an overview of protective arrangements, a discussion of District of Columbia conservatorship law, a description of special petitions, conservatorship proceedings, and sample forms.

Judicial recognition of the need for training resources might generate efforts within the community. The state/area agency on aging could be involved. Such training and ongoing technical assistance should perhaps include four related facets:

(a) specific duties of the guardian under statute, regulation, or court rule; nature of the "fiduciary duty;" principle of the "least restrictive alternative";

(b) information about community resources, including the state/area agency on aging;

(c) information about the aging process, and the myths and stereotypes of aging; importance of encouraging the ward's independence whenever possible;

(d) advice about financial management, accounting, budgeting; instructions as to annual reports.

Issue IV.C.

Public Guardianship and Private Guardianship Agencies

Issue IV.C.(1)

How should courts respond to the special concerns presented by public guardianship and private guardianship agencies?

Background

Some 34 states have statutory provision for public guardian services. Some programs operate under the supervision of the courts, some are operated by an independent state agency, others by a social service agency, and in still others a county agency administers the program. Some public guardianship programs are highly organized and staffed, while others are smaller and more personal. Sixteen programs provide services specifically for the elderly. (Schmidt, Miller, Bell and New, pp. 167-168) In addition, private profit and non-profit guardianship agencies are springing up in states with high elderly populations (such as "Planned Protective Services" in Los Angeles, and "Planned Protective Services of Arizona, Inc.").

Legal scholars and advocates for the elderly have argued vigorously about the merits of public guardianship. Supporters contend there are many individuals who do not have willing family or friends to serve as guardian, nor estates to pay for guardians; and that the expertise arising from assisting a large number of wards can result in a more effective service than could be provided by private guardians. Detractors fear that public guardianship is/can be overused, and used inappropriately when less drastic arrangements could suffice; and express the concern that public guardianship offices are often large bureaucracies with impossible caseloads, and no time to devote to developing a personal relationship with wards (Schmidt, Miller, Bell and New, p. 15, p. 173-174; also see Dudovitz, pp. 86-87; Axilbund, pp. 16-17; Frolik, pp. 642-649). Indeed, the 1981 study of Public Guardianship and the Elderly found that public guardian offices are generally understaffed and underfunded, and "many of them are approaching the saturation point in number of wards." As a consequence, most of the wards receive very little personal attention, "with many being seen for a total of only a few hours per year." (Schmidt, Miller, Bell and New, p. 172)

More specifically, courts handling cases in which impersonal guardians -- public guardianship offices or private guardianship agencies -- are involved, should perhaps be particularly aware of the following issues:

(a) Institutionalization. Because many public guardian programs are understaffed and underfinanced, there is sometimes a tendency to place wards in institutions without

examining less restrictive alternatives:

> "Certainly from the point of view of the caseworker, it is much easier to place a ward in a nursing home or mental health facility, rather than take the effort required to have the individual remain in an independent living situation. If the individual is institutionalized, the public guardian will not be required to do as much on behalf of his/her ward since the institution will be providing most of the essential services." (Dudovitz, p. 87; also see Frolik, p. 648)

The Delaware Public Guardian has concurred in the difficulty of public guardians keeping wards in the community:

> "Maintaining wards in their own homes . . . is the most difficult of the various tasks of guardianship, as these wards require frequent visits and continuous attention. In most cases, services available from existing agencies are inadequate to meet the needs of these individuals, and the office becomes involved in menial but necessary tasks such as shopping for groceries and clothing, transporting to and from medical appointments, etc." (Axilbund, p. 5)

Moreover, placing the ward in a nursing home rather than being responsible for his/her day to day maintenance is usually more cost-effective for the public guardian, stretching scarce resources, and allowing the acceptance of a greater number of wards.

In the recent case of Fiore v. Hill, No. 81-5840 (C.D. Cal. Nov. 1983), a jury found that routine institutionalization by a public guardian without examination of lesser alternatives violated the civil rights of the ward. Mrs. Fiore was an 80-year-old woman prone to wandering, but under the care of her husband. When she became lost, police took her to a hospital, she was quickly "evaluated" and transferred to a nursing home. Thereafter, although her husband applied to be her guardian, the court chose the Public Guardian instead. The public guardian, however, never conducted any further evaluation nor considered any other placement and visited her rarely. The Fiores eventually sued the Public Guardian in federal court, successfully claiming that their constitutional rights to the least restrictive alternative and the right of a husband and wife to live together had been violated.

Hence, courts should pay particular attention to the extent to which public guardians have assessed a full range of alternatives for the ward.

(b) Public benefits. Most elderly wards of public guardians are poor, and many are recipients or potential recipients of public benefits such as Supplemental Security Income, food stamps, Medicaid and property tax relief, in addition to Social Security and Medicare. Public guardians must assure that their wards are receiving the maximum benefits to which they are entitled, challenge unfair denials, and avoid interruptions in benefits. Ideally, this would require that the public guardian caseworker conduct a "public benefits check-up" or analysis to determine the ward's eligibility for a range of federal, state and local programs, as well as a periodic follow-up to assure the proper papers are filed. Because of large caseloads, this may not always be done, and losses to the ward can result. For example, in Regan v. Terrell (No. 70-C1320 (Ill. Cook County Cir. Ct., filed April, 1979) plaintiffs sued the Cook County public conservator for failure to file for property tax relief and rent rebates, alleging a deprivation of property without due process of law. (Dudovitz, p. 87). Thus, the public guardian's annual report should include actions taken regarding the ward's eligibility for public benefit programs.

(c) Overutilization In many cases, the public guardianship offices and private guardianship agencies initiate petitions of incompetency. Some commentators have claimed this is a potential conflict of interest because it allows them to "create" their own clients. Even if they don't initiate the action themselves, they might easily encourage social service agencies to file petitions.

> "No matter how idealistic is the motivation that creates an office of public guardian, it seems certain that the office in time will become bureaucratized with its primary objective being its own survival and growth. We must expect public guardianship offices to work closely with social service agencies to promote the use of guardianships." (Frolik, p. 646)

Moreover, social service agencies may be only too willing to initiate petitions or make referrals to the public guardian (or to private guardianship agencies). It may represent an easy "short-cut" to the difficult alternative of working intensively with the client to obtain his/her cooperation and consent to services (see Frolik, p. 647).

Of course, public and private guardianship agencies often work hard to screen out inappropriate referrals, and to handle only those cases absolutely necessary. For 1983 and

1984, for example, only one in ten referrals to the Los Angeles County Office of Public Guardian resulted in incompetency petitions; and in the 1985 study, only about 20%. (Steinberg, pp. 3 and 21). Nonetheless, because of the potential conflict of interest, the need for guardianship must be closely scrutinized by the court in cases involving a public or private guardianship agency.

(d) Provision of services. One important function of many public guardianship programs (and private guardianship agencies) is to serve as case manager, coordinating services needed by the ward. Critics have noted a potential conflict of interest in this, since the guardian is also responsible (in some states statutorily, and generally through its fiduciary duty) for ensuring and monitoring the provision of those services. (Frolik, p. 645; Parry, p. 390) Thus, the provision of services by public or private guardianship agencies might warrant particular judicial review.